

1 IN THE UNITED STATES DISTRICT FOR
2 THE WESTERN DISTRICT OF TEXAS
3 SAN ANTONIO DIVISION

4 JOE HOLCOMBE, et al., :
5 :
6 Plaintiffs, :
7 :
8 v. :No:
9 :5:18-CV-00555-XR
10 UNITED STATES OF :
11 AMERICA, :
12 :
13 Defendant. :
14

11 VIDEOTAPED DEPOSITION OF
12 COLONEL OWEN W. TULLOS

14 Wednesday, December 4, 2019
15 1:33 p.m.

16 United States Attorney's Office
17 United States Department of Justice
18 175 N Street, Northeast
19 Three Constitution Square
20 Washington, D.C.

21 Noojan Ettehad, Videographer
22 Terry L. Bradley, Court Reporter

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P R O C E E D I N G S

(Exhibit 1, 2, 3, 4, 5, 6, 7, 8, 9,
10 marked for identification.)

THE VIDEOGRAPHER: Good morning.
Good afternoon. This is the video-deposition
of Owen Tullos in the matter of Joe Holcombe,
et al., versus United States of America.

This deposition is being held in
Washington, D.C. on 12/4/2019, at 13:33. My
name is Noojan Ettehad, and I'm the
Videographer.

Will the counsel please introduce
themselves.

MR. ALSAFFAR: Jamal Alsaffar for
the plaintiffs.

MR. JACOB: Tom Jacob for the
plaintiffs.

MR. DEMERATH: Justin Demerath for
the plaintiffs.

MR. FURMAN: Austin Furman for the
defendant, United States.

1 MR. STERN: Paul Stern for the
2 defendant, United States.

3 Lieutenant Colonel Jeff Phillips for
4 the Air Force.

5 MS. SANDERS: Christin Sanders for
6 the --

7 MR. REYNOLDS: Brett Reynolds for
8 the plaintiffs.

9 MS. SANDERS: -- United States
10 representing the Air Force.

11 MR. FURMAN: On the phone?

12 MR. REYNOLDS: Brett Reynolds for
13 the plaintiffs, Workman family and Colbath
14 family.

15 MR. ALSAFFAR: Brett Reynolds for
16 the plaintiffs.

17 MR. FURMAN: Anyone else on the
18 phone?

19 THE VIDEOGRAPHER: The Court
20 Reporter can swear the witness.

21 MS. STRAHAN: April Strahan for
22 various plaintiffs.

1 MR. VALADEZ: Aaron Valadez on
2 behalf of Dan Sciano for the plaintiffs.

3 THE VIDEOGRAPHER: Thank you. The
4 Court Reporter can swear the witness now.

5 MR. ALSAFFAR: Let's make sure we
6 get everybody on the phone.

7 MR. FURMAN: Do we have everyone on
8 the phone?

9 MR. ALSAFFAR: The last person we
10 had was Aaron. Is there anyone else on the
11 phone?

12 Okay. If you could, guys and gals,
13 if you all could turn off your --

14 Or I'm sorry.

15 -- mute your phones, we're about to
16 begin.

17 MR. REYNOLDS: Already done.

18 MR. ALSAFFAR: That's not possible.

19

20

21

22

1 COLONEL OWEN TULLOS,
2 having been first duly sworn, testified as
3 follows:

4
5 EXAMINATION

6 BY MR. ALSAFFAR:

7 Q. Can you please state your name for
8 the record.

9 A. Owen Tullos.

10 Q. Could you spell your name.

11 A. O-W-E-N, T-U-L-L-O-S.

12 Q. And can you please tell me your
13 rank.

14 A. Colonel in the United States Air
15 Force.

16 Q. Colonel Tullos, thank you for being
17 here, and thank you for your service as well.

18 Let's just start a little bit, just
19 a little bit sort of an intro, and let me ask
20 you a few questions about your experience.
21 Have you ever had a deposition before in a
22 lawsuit?

1 A. No.

2 Q. Okay. Have you ever taken a
3 deposition?

4 A. Yes.

5 Q. Okay. And I imagine as an attorney
6 in the Air Force you've taken quite a few?

7 A. Only about five.

8 Q. Okay. Okay.

9 A. Four or five.

10 Q. So you're pretty general --
11 -- generally familiar with the rules
12 of a deposition, but I'll go through those in a
13 second.

14 Can you please tell us right now
15 what your current station is.

16 A. I'm stationed at Quantico Marine
17 Corps Base with the OSI.

18 Q. With the OSI?

19 A. Yes.

20 Q. And if you had to describe, what is
21 your job?

22 A. I'm the Staff Judge Advocate for the

1 Headquarters, Air Force OSI.

2 Q. So you're the Staff Judge Advocate
3 for the Air Force OSI stationed at Quantico,
4 the Headquarters, correct?

5 A. Yes.

6 Q. Okay. And how long have you been in
7 that position?

8 A. Since July, so 5 months.

9 Q. 2019?

10 A. Yes.

11 Q. Okay. And can you tell us where you
12 were stationed prior to Quantico?

13 A. Prior to Quantico I was at
14 Vandenberg Air Force Base. I was the Staff
15 Judge Advocate, 14th Air Force.

16 Q. And where was that located?

17 A. Vandenberg Air Force Base,
18 California.

19 Q. And what was your position again?

20 A. I was the Staff Judge Advocate for
21 14th Air Force, dual hatted as the Staff Judge
22 Advocate --

1 Staff Judge Advocate of 14th Air
2 Force, dual hatted as the Staff Judge Advocate
3 for Joint Force Base Component Command, and
4 then Judge Advocate later on but it changed.

5 Q. Can you give me the time period that
6 you were the Staff Judge Advocate at
7 Vandenberg.

8 A. From 2014, July of 14, to July of
9 2016.

10 Do you need me to slow down or speak
11 up?

12 Q. Both.

13 So I was just about to tell you to
14 try to slow down just a little bit because --

15 And this is terrible advice, right?
16 Because it's the hardest thing to follow -- I'm
17 telling you -- to alter your speech that you've
18 been used to for the better part of, I would
19 assume, your life. But if you can try to slow
20 down. And if at any time during this
21 deposition I ask you to slow down, I'm really
22 doing that for her benefit, and mine as well.

1 I'm not trying to be rude. And the second
2 thing is: If I tell you to speak up, same
3 reason. We're all here to get testimony
4 accurately taken down, and so that's why we're
5 doing it.

6 Okay. You were telling me that you
7 were at Vandenberg 'til about 2016. I assume
8 then you went to Quantico, right?

9 A. Yes.

10 Q. All right. Can you tell me where
11 you were before you were at --

12 A. You know what? I'm sorry. I gave
13 you the wrong dates.

14 Q. That's okay. Go ahead. Correct.

15 A. It was 2016 July to 2019 July.

16 Q. You got them backwards.

17 A. I got them backwards.

18 Q. All right. So before you were at
19 Vandenberg can you tell me your duty station.

20 A. I was Headquarters Air Combat
21 Command at Langley Air Force Base, Virginia.

22 Q. For how long? What time periods?

1 A. July of 2014 to July of 2016.

2 Q. And what was your job there?

3 A. There I was Chief of Operations Law
4 and Chief of Military Justice for about a year
5 each.

6 Q. Okay. And where were you before
7 that? Before Langley.

8 A. Before Langley I was at Holloman Air
9 Force Base, New Mexico, as the Staff Judge
10 Advocate for the 49th Wing.

11 Q. Okay.

12 A. And I was there from 2012, July of
13 2012 to July of 2014.

14 Q. Where were you before Holloman Air
15 Force Base?

16 A. United States Cyber Command at Fort
17 Meade, Maryland.

18 Q. Uh-huh.

19 A. I was there from 2010, July of 2010
20 to July of 2012.

21 Q. You said Cyber Command. Would you
22 explain to me what you were doing at Fort

1 Meade?

2 A. I was the Deputy Staff Judge
3 Advocate for Operations Law at U.S. Cyber
4 Command when we stood it up in 2010 for 2
5 years.

6 Q. You were Deputy Staff Judge
7 Advocate. Does that mean you had someone over
8 you?

9 A. I did. Gary Brown was the Staff
10 Judge Advocate. I was --

11 They had two Deputies.

12 Q. Uh-huh.

13 A. One was for a regular Deputy for all
14 the administrative stuff. I focused on
15 Offensive Cyber Operations.

16 Q. Where were you prior to Fort Meade?

17 A. I was at Geilenkirchen --
18 Would you like me to spell that?

19 Q. I would.

20 I mean, I know how, but I'm sure
21 other people (laughing) don't know how to spell
22 it.

1 A. Just the way it sounds.

2 G-E-I-L-E-N-K-I-R-C-H-E-N.

3 -- NATO Air Base. Geilenkirchen

4 Nato Air Base, Germany. I was the Staff Judge

5 Advocate for the U.S. unit there from July of

6 2007 to July of 2010.

7 Q. Thank you.

8 And Colonel, where were you prior to

9 your Germany station?

10 A. I was 1 year in LLM Program.

11 Q. I'm sorry?

12 A. 1 year in an LLM Program --

13 Q. Okay.

14 A. -- at the Army JAG school. I got a
15 military LLM with a specialty in International
16 and Operations Law.

17 Q. Okay. So that would have been
18 2000 --

19 A. 2006 --

20 Q. -- 6.

21 A. -- to 2007 July.

22 I think it may have been August at

1 that point, but --

2 Q. Okay. Prior to getting your LLM,
3 what was your duty station?

4 A. I was the Deputy Staff Judge
5 Advocate at Minot Air Force Base, North Dakota.
6 That was from July of 2004 to July of 2006.
7 And during that time I deployed as the Staff
8 Judge Advocate at Kirkuk Regional Air Base in
9 Iraq.

10 Q. In between 2004 and 2006 you were
11 deployed to Iraq?

12 A. From May to September.

13 Q. And what were you doing in Kirkuk?

14 A. I was the Staff Judge Advocate at
15 Kirkuk.

16 Q. Okay. All right. What about prior
17 to the North Dakota post?

18 A. It was Hickam Air Force Base,
19 Hawaii, July of 2000 --

20 June of 2001 to July of 2004.

21 Q. Okay. And your position there?

22 A. I was Assistant Staff Judge

1 Advocate, and different positions within the
2 office: Chief of Military Justice, Chief of
3 General Law or Civil Law, Chief of Operations
4 Law.

5 Q. Okay.

6 A. And then I was Assistant U.S.
7 Attorney --

8 -- Special Assistant U.S. Attorney
9 for a period of time.

10 Q. Okay. And prior to Hawaii, what was
11 your station?

12 A. I was Area Defense Counsel at
13 Maxwell Air Force Base, Alabama, from
14 July 2000 --

15 I'm sorry.

16 -- July of 1999 to July of 2001.
17 June of 2001. And then I spent 6 months prior
18 to that at the Base Legal Office.

19 Q. Okay.

20 A. I did labor law.

21 Q. When you were at Maxwell Air Force
22 Base what were your duties?

1 A. At the Base Legal Office? I was 6
2 months in the Base Legal Office.

3 Q. Uh-huh.

4 A. I primarily did labor law, and I did
5 some disciplinary issues, but not a lot of core
6 military justice, as I was moving over to be
7 the defense counsel for those 2 years.

8 Q. Okay. So when you say "I was moving
9 over to be defense counsel", you were moving
10 over to defend military folks who were being
11 charged with various --

12 A. Right.

13 Q. -- crimes and misdemeanors within
14 the military?

15 A. Yes.

16 Q. Okay.

17 A. And I was also Special Assistant
18 U.S. Attorney during that time prior to defense
19 counsel for those 6 months.

20 Q. Okay. Can you tell me what you did
21 in terms of your job duties prior to Maxwell
22 Air Force Base.

1 A. Yes. I was at Peterson Air Force
2 Base, Colorado from September of 1996 to
3 December of 1998. And during that time I was
4 Chief of Civil Law, Chief of Operations Law,
5 Chief of Claims.

6 Q. Okay. And prior to Peterson?

7 A. I was in law school.

8 Q. Okay. Got it. We got there. I'm
9 impressed.

10 Can you tell me, what law school did
11 you go to?

12 A. University of Oklahoma.

13 Q. Jesus. I should have been told that
14 beforehand. I'm going to have to calm down now
15 (laughing). He didn't go to U --

16 He didn't go to UT, so that's his
17 problem, not mine. But all right. Okay. I
18 was invited by several people to go to the
19 game, but I declined with prejudice to go
20 (laughing) this weekend.

21 Okay. Let me ask you a little bit
22 more about your background just -- not much. I

1 don't want to spend a lot of time on this, and
2 I really appreciate your thoroughness -- but I
3 want to have just a little bit sort of a
4 thumbnail sketch type understanding of what it
5 is that you did at each base. Let me skip to
6 the Hawaii in June 2001 to July 2004. I
7 said --

8 I think you said you were Assistant
9 SGA at some point during that deployment,
10 correct?

11 A. The official position that just
12 overarches everything other than the Staff
13 Judge Advocate or Deputy Staff Judge Advocate?

14 (Discussion with Court Reporter.)

15 Other than being a Staff Judge
16 Advocate, which is basically the Chief Legal
17 Counsel at that echelon, or the Deputy Staff
18 Judge Advocate, everybody else is an Assistant
19 Staff Judge Advocate but given different
20 divisions and titles.

21 Q. Okay.

22 A. So I was an Assistant Staff Judge

1 Advocate, and but I was a Chief of different
2 divisions during that time.

3 Q. So just to sort of -- general
4 description -- what did you do as an Assistant
5 Staff Judge Advocate when you were stationed in
6 Hawaii?

7 A. I was Chief of our General Law
8 Section which looked at everything other than
9 military justice and everything from labor law
10 to ethics.

11 Q. Uh-huh.

12 A. Just a variety of civil issues and
13 legal assistance that we provided to airmen and
14 their families on personal legal matters. I
15 was Chief of Justice for about 16 months during
16 that time that oversaw our military court
17 martial non-judicial punishment disciplinary
18 actions. And then I was, throughout that time,
19 Chief of Operations Law.

20 Q. Okay.

21 A. That was shortly after 9/11. And
22 then the last few months I was in charge of our

1 Magistrate Program as Special Assistant U.S.
2 Attorney.

3 Q. When you were Chief of Military
4 Justice in Hawaii did some of your
5 responsibilities involve overseeing criminal
6 investigations of military members?

7 A. Yes.

8 Q. And prosecuting those as well?

9 A. Yes.

10 Q. All right. And working with the
11 Security Forces and Special Investigation Units
12 in the Air Force that were part of the
13 investigation process?

14 A. Yes.

15 Q. Okay. Tell me about the North
16 Dakota deployment 2004 to 2006. What I want to
17 know about that is, I think you said you were
18 Staff Judge Advocate in Iraq. Kirkuk.

19 A. Right.

20 Q. Can you tell me about what your --
21 just again, general description -- of your job
22 as an SJA in Iraq.

1 A. And that was only about a 5-month
2 period of --

3 Q. Okay.

4 A. -- time in that 2 years. It was in
5 2005. I was the Chief Legal Counsel on base.
6 I was the only legal counsel for the Air Force
7 on Kirkuk Regional Air Base. Did a number of
8 different things: Disciplinary issues, and we
9 had investigations that were going on, on the
10 base. I also did rules of engagement for our
11 people that would go outside the wire, so for
12 Quick Reaction Forces, DOD. I worked some
13 civil liaison with a couple of projects, Deputy
14 Director of Antiquities for artifacts that were
15 on the base. Also had to work with the Army on
16 some rules of engagement issues. We worked on
17 a civil project for housing outside of our
18 base. And then I worked with training the
19 Iraqi Government, prosecuting --

20 -- I'm sorry.

21 -- the Investigative Judges --

22 Q. Yeah.

1 A. -- and the Investigators on a
2 criminal system.

3 Q. Did you work with any U.S.
4 Attorneys while you were over in Iraq in terms
5 of development of the Civil Justice System over
6 there?

7 A. No. And that was primarily because
8 Kirkuk had one of the only functioning
9 judiciaries --

10 Q. Uh-huh.

11 A. -- and that's what I was doing with
12 the Investigators and the Investigative Judges
13 to try to keep that functioning.

14 Q. Was part of your job as an SJA when
15 you were in Iraq -- and I want to make sure I
16 understand this correctly. If I don't, please
17 correct me -- were you a part of the
18 investigation arm of military folks, enlisted
19 military folks, who were being investigated and
20 prosecuted for crimes? Just military folks?

21 When you were an SJA in Iraq.

22 A. Military folks, yes.

1 Q. Okay.

2 A. And then if civilians were on the
3 base --

4 Q. All right.

5 A. -- my Commander was the Installation
6 Commander, and so any kind of civil --
7 -- civilian acts of misconduct would
8 be under that investigative purview as well.

9 Q. You said you also --

10 -- part of your job as an SJA in
11 Iraq was dealing with people who went outside
12 the wire. Again, I'm sorry if I don't
13 understand the nomenclature, but are you
14 talking about military folks who might have
15 escaped the base or went outside the base
16 without permission or AWOL? Anything like
17 that?

18 A. No. As part of their official
19 duties.

20 Q. Okay.

21 A. So they would leave the base
22 compound --

1 Q. Right.

2 A. -- security --

3 Q. Uh-huh.

4 A. -- and then they would go out into
5 the local community for a variety of reasons.

6 Q. Okay.

7 A. And so we would work on if you left
8 the base and went out, what are the rules of
9 engagement? How do you deal with things that
10 you encounter out there?

11 Q. Makes sense. Going back to what you
12 were describing for your SJA role in Iraq. As
13 it relates to the prosecution and investigation
14 of military folks in Iraq, were you responsible
15 for working with local military folks who were
16 sort of the equivalent of the Special
17 Investigation and Security Forces that we have
18 here in the States?

19 Investigators.

20 A. Yes. However, their role was
21 significantly different there. They were not
22 doing their primary law enforcement duties --

1 Q. Uh-huh.

2 A. -- in that regard. They were doing
3 more force protection or working with other
4 agencies with different missions.

5 Q. And we'll talk about some of this in
6 more detail as it relates to Devin Kelley's
7 case, but when you were in Iraq were you --

8 In relation to the SJA duties that
9 were for criminal investigation of military
10 members and prosecution, in terms of the rules
11 that applied in Iraq and when you were SJA,
12 were they the same kind of instructions and
13 Defense instructions and Air Force instructions
14 that were also being applied in the United
15 States for those investigations?

16 A. For the military members, yes.

17 Q. That's what I'm talking about.
18 Yeah.

19 A. Under the CMJ, the Uniform Code of
20 Military Justice, that would --
21 -- that would be our guidance for
22 military members and discipline.

1 Q. Uh-huh.

2 A. Didn't really have many issues.

3 Q. Okay.

4 A. At least didn't have issues that
5 rose to the level of court martial.

6 Q. Got it.

7 A. And then for civilians they would
8 have to look at a different source, like the
9 Military Extraterritorial Jurisdiction Act.

10 Q. In terms of the military
11 investigations -- let's say, let's not talk
12 about the actual prosecution, but just the
13 investigations that precede the prosecution
14 that you were involved with over there -- were
15 the rules that were applying in those the same
16 rules that were applying in the States for
17 those investigations?

18 And what I mean by that, like the
19 Department of Defense instructions, the Air
20 Force instructions, the Security Forces
21 instructions.

22 A. Yes.

1 Q. Let me ask you now --
2 I'm sorry I'm going through this.
3 This is part of the tortuous part of the
4 deposition when I'm just trying to get a little
5 information. Um, so let's get --

6 Let's jump to the, I believe the
7 NATO assignment in Germany in 2007 to 2010. I
8 think you said you were the Staff Judge
9 Advocate there.

10 A. Yes.

11 Q. So you're the boss --

12 A. Of me.

13 Q. -- of the other Judge Advocates.

14 A. I was the only attorney.

15 Q. Oh. Were you the only one? That's
16 a great way to be a boss (laughing). You get
17 to say you're the boss, and you don't have to
18 tell anyone else that there's anyone in your
19 command.

20 A. It's hard to find good help.

21 Q. That's right. That's right.

22 So, and I'm just trying to keep this

1 into the relevant time matter. But when you
2 were an SJA in Germany, was it the similar kind
3 of responsibilities where you were responsible
4 for overseeing prosecutions of military members
5 and the criminal investigations that led to
6 those prosecutions? Was that part of your job
7 there?

8 A. It was a much smaller part of my job
9 there. The distinction on my base was because
10 I was the only attorney --

11 Q. Uh-huh.

12 A. -- I could not give fair advice and
13 prosecute. You can't do both. And most of my
14 job was in the international realm or the
15 general law realm. I had another base that
16 handled the investigations and prosecutions.
17 And so I coordinated with them, but I was not
18 giving the primary advice. In fact, even our
19 Office of Special Investigations didn't fall
20 under my base. It was out of Spangdahlem.

21 Q. Uh-huh. Okay. So it was a small
22 part of your job to be involved in the

1 prosecution and criminal investigation. That
2 wasn't a major part; it was a small part of
3 your job.

4 A. Yes.

5 Q. And same question as before. I'm
6 just kind of going through the same routine
7 here. When you were at the Germany --

8 When you're in Germany as an SJA
9 where the --

10 -- as it relates to the military
11 investigations and prosecutions in the
12 military, were you required to follow the same
13 types of instructions and depart --

14 -- dependent --

15 -- Department of Defense
16 instructions and Air Force instructions that
17 would apply at that time in the United States?

18 A. Yes. With the nuance that
19 international law would impact what would
20 happen off base. Or depending on where an
21 offence occurred or who was involved, we had to
22 factor in the different host nation's laws.

1 Q. That makes sense. So you had to be
2 familiar with the international law and also
3 the instructions that applied for the Air Force
4 in the United States.

5 A. Yes.

6 Q. Okay. So let's jump to the Fort
7 Meade. I think you said --
8 -- told me you were cyber
9 communications there, and that part of your job
10 from --

11 This was July 2012 to --

12 A. July of 2010 to --

13 Q. 10.

14 A. -- July of 2012.

15 Q. Right. Okay. So this is Fort Meade
16 July 2010 to 2012. You were Deputy Staff Judge
17 Advocate?

18 A. For operations law.

19 Q. For operations law. So you did
20 not --

21 Did you not have any military
22 investigation prosecution experience there?

1 A. Very little. I think we looked at a
2 couple of small disciplinary actions that did
3 not rise above a non-judicial punishment, with
4 the exception of one case.

5 Q. I understand.

6 A. But that wasn't my primary duty.
7 And just for clarification --

8 Q. Yes.

9 A. -- Cyber Command is a Combatant
10 Command.

11 Q. That was going to be a question I
12 had. Okay. That makes sense then.

13 Let's jump, now we're at Holloman
14 Air Force Base. And I believe this is the
15 relevant time period during part of Devin
16 Kelly's investigation and ultimate prosecution
17 and conviction. Is that correct?

18 A. Yes.

19 Q. All right. And when you were --
20 You were a Staff Judge Advocate at
21 Holloman Air Force Base?

22 A. Yes.

1 Q. All right. And just like with the
2 prior questions, let me ask them for this time
3 period. While you were the Staff Judge
4 Advocate at Holloman Air Force Base, were you
5 responsible for military -- in part -- military
6 criminal investigations, overseeing those, and
7 also overseeing and prosecuting those crimes
8 for military members?

9 A. Yes.

10 Q. And in pursuing and following your
11 job duties at Holloman Air Force Base, were you
12 responsible for knowing and understanding the
13 various Department of Defense instructions and
14 Air Force instructions and manuals that apply
15 to criminal investigations of military members
16 while you were there?

17 A. Generally, yes.

18 Q. Okay.

19 A. But the primary focus in my office
20 was moving towards disciplinary action or court
21 martial. The Air Force has independent
22 investigative authority outside of the JA legal

1 channels, so it's not all of the instructions
2 that we would be familiar with. In fact, some
3 of them I don't even think we were privileged
4 to.

5 Q. So when you say "generally, yes",
6 you had a part of your job as Staff Judge
7 Advocate at Holloman Air Force Base was to be
8 familiar with the various DOD instructions and
9 Air Force instructions that related to
10 prosecution, reporting, investigation, but you
11 had a lot of other duties as well you had to be
12 responsible for?

13 A. Lots of different parts of that
14 question.

15 Q. Sure. Break it down for me.

16 A. The parts that oversaw
17 investigations, especially with regard to
18 seizure of evidence, constitutional rights,
19 admissibility, chain of custody, those things,
20 we were much more involved with that. We did
21 not have responsibility over the reporting that
22 you mentioned. We do have a role in the type

1 of offences that we're looking at that might
2 deal with Lautenberg --

3 Q. Uh-huh.

4 A. -- or something like that, but we
5 did not have the responsibility on issues
6 outside of our prosecutions. So I didn't
7 oversee the execution of administrative duties
8 or other duties within Security Forces or OSI.

9 Q. You'd mentioned a little bit ago you
10 had much more responsibility in terms of
11 involvement and oversight of collection of
12 evidence.

13 A. Yes.

14 Q. Okay. Is that fair?

15 A. Yes.

16 Q. Okay. And then when it came to the
17 actual reporting, transmitting information
18 regarding criminal or convictions, I assume
19 fingerprints, you didn't have much involvement
20 in?

21 A. That's correct.

22 Q. All right. Did you have any

1 involvement in it?

2 A. No.

3 Q. Okay. Now, so fair for me to
4 understand that as a Staff Judge Advocate at
5 Holloman Air Force Base during the time that
6 Devin Kelley was being investigated, you were
7 not yourself an employee responsible for
8 reporting to the FBI NICS database?

9 A. That's correct.

10 Q. Okay. And nobody in your SJA staff
11 was an employee responsible for reporting to
12 the NICS database?

13 A. No.

14 Q. Okay.

15 A. We could be consulted --

16 Q. Right.

17 A. -- if someone had a question, but
18 that was not our area of responsibility.

19 Q. Okay. If you were consulted on
20 those questions, were you required -- while you
21 were at Holloman Air Force Base -- to be
22 familiar with the various instructions and

1 manuals that applied to reporting to the FBI?

2 A. Yes.

3 Q. Okay. And did you do that when you
4 were there? Familiarize yourself with those
5 instructions and manuals.

6 A. Generally.

7 Q. Yeah.

8 A. But as a Staff Judge Advocate I was
9 not the one that was practicing in those areas
10 specifically --

11 Q. Okay.

12 A. -- so it was a much --
13 I would say that is probably one of
14 the things that I did not work personally, so I
15 didn't have as much familiarity.

16 Q. Okay. How did you get the
17 familiarity that you had at the time you were
18 at Holloman Air Force Base with the
19 instructions and Air Force manuals and Air
20 Force instructions that related to criminal
21 investigations and collection and reporting of
22 evidence?

1 A. Part of it is through experience.

2 Q. Okay.

3 A. And part of it is through training
4 that we received at different courses, and then
5 reading. And especially as an issue would pop
6 up, as they would occur we would study back on
7 those.

8 Q. Okay. Understand. Okay.

9 A. Also continuity books.

10 Q. Continuity?

11 A. Continuity books that we'd pass on
12 to make sure that recurring issues that we
13 dealt with on a regular basis would --

14 Q. Can you tell me what you mean by
15 continuity book.

16 A. Continuity book. We have changeover
17 in leadership, we have changeover in different
18 sections. And to ensure that people can get up
19 to speed more quickly, we will have these
20 binders, or now we do it more electronically,
21 but just key references or key research
22 materials that would be passed on. Sometimes

1 we did talking papers. I think in that office
2 we had talking papers from each of the
3 sections --

4 Q. Uh-huh.

5 A. -- on current issues.

6 Q. Okay. When you say "continuity",
7 are you talking about continuity between the
8 Staff Judge Advocate's department and the AFOSI
9 and Security Forces departments?

10 A. No.

11 Q. Okay. So what continuity are you
12 talking about?

13 A. From the prior SJA to me.

14 Q. Okay.

15 A. Or from a Deputy. Anyone changing
16 positions. So as we handed off positions
17 within the office we would try to make sure
18 that we had some type of program that would
19 spin people up on key legal issues.

20 Q. Did these continuity books that
21 you're talking about address or teach or train
22 in any way the Staff --

1 -- the Judge Advocates under your
2 command in what the instructions from the
3 Department of Defense and Air Force were
4 relating to collection, storage, reporting of
5 criminal investigation and criminal history
6 information?

7 A. If I could break down the question a
8 little bit.

9 Q. Sure. Sure.

10 A. I do recall -- and part of it is
11 just a general instruction -- had more
12 information on the collection of storage of
13 infor --

14 -- of evidence. I don't recall
15 anything specifically on the reporting of or
16 indexing of that information.

17 Q. I understand.

18 A. If I understood your question.

19 Q. That's my --

20 That was my question. Yeah.

21 So you do recall that some of it may
22 have invo --

1 -- some of it -- I'm sorry -- did
2 involve collection of evidence, storage of
3 evidence, but you're not sure -- you don't have
4 a specific memory either way -- about whether
5 those continuity books included what to do to
6 make sure those were reported to the FBI.

7 A. That's correct.

8 Q. Okay. Um, I'm going to give you --
9 The continuity book, is it called a
10 continuity book?

11 A. Generally it is.

12 Q. Yeah. I mean, is it a book? Or is
13 it a binder?

14 A. Mine was a folder --

15 Q. Okay.

16 A. -- I think. And gosh. I'm sorry.
17 I'm trying to remember. I don't recall exactly
18 the form of it that I received it at that time.

19 Q. And where was it kept? The
20 continuity book. In the SJA office?

21 A. I don't recall. It could have been
22 in the library, could have been in the

1 administrative office.

2 Q. Okay. And was it passed around to
3 the various Judge Advocates to read and learn
4 and look over?

5 A. Yes. It was beyond just law.

6 It was beyond just the law. It
7 would be information about different key
8 personnel on the base, different end processing
9 requirements, just a general familiarity
10 because the Staff Judge Advocate's
11 responsibility of managing personnel and
12 budgets, office equipment, that's part of what
13 we do as well. So it's not just a legal
14 continuity that we're looking at.

15 Q. I understand. And I'm going to try
16 to make it --

17 And I appreciate actually how you're
18 answering because it help --

19 -- it's helpful. But and I'll try
20 to make it easier on you by not asking you to
21 tell me everything that you know. Unless I ask
22 you to tell me everything you know, I'll try to

1 say: Well in part. Or is this part of the
2 job?

3 -- just so you don't have to go:

4 Well, am I remembering all the other parts too?

5 -- because I want you to feel
6 comfortable with that.

7 Let me give you a little bit of
8 whiplash jumping back, because I think we've
9 covered your history up until Devin Kelley's
10 investigation.

11 I wanted to talk to you a little bit
12 about what a deposition is like, but you're
13 actually doing a fantastic job. And but I want
14 to make sure you understand the rules so that
15 in fairness you understand the rules.

16 The Court Reporter has already done
17 a great job of reminding you to speak up and
18 slow down. And if I kind of put my hand out,
19 that's all I'm doing, that's what I mean,
20 because I'd like not to interrupt you. I'd
21 like just to kind of tell you: Slow down a
22 little bit.

1 -- and I'll try to be respectful of
2 that, okay?

3 If you need a break, just let us
4 know, and we'll come to a natural stop very
5 quickly so that you can --

6 This is not a marathon test. If
7 that's just to stretch your legs, go to the
8 bathroom, or discuss anything, just let me
9 know, okay?

10 A. Okay.

11 Q. The second thing too is that I'm
12 going to try to make sure that you understand
13 my questions, and I'm going to try to make them
14 simple, but I'm not going to succeed at doing
15 that a lot. I know I won't. And if that
16 happens, please tell me that you don't
17 understand the question because it's not fair
18 if you don't understand the question, and I
19 want you to understand it, okay?

20 A. If I start to go in a direction that
21 you're not wanting me to go, I won't take
22 offence if you interrupt to redirect.

1 Q. Yeah. I'll --
2 It helps your trial lawyer. But I
3 also don't want to interrupt you if I can help
4 it. I might if it goes a little bit. I want
5 you to say what you think the answer is. And
6 then I might object to non-responsive, which
7 you probably are familiar with. That's just
8 for the record. It's not an insult. It's just
9 for the record so we can preserve it later to
10 get ruled on by the Judge.

11 A. Right.

12 Q. On that note, if Mr. Furman or Mr.
13 Stern, your U.S. Attorneys over here, object,
14 that's normal too. They're preserving record.
15 And unless they object and specifically
16 instruct you not to answer, you still have to
17 answer my question even though they object.
18 You understand that?

19 A. Yes.

20 Q. You understand you're under oath?

21 A. Yes.

22 Q. You understand the penalties of

1 perjury apply?

2 A. Yes.

3 Q. You understand it's the same oath as
4 if you were in a courtroom sitting on the
5 witness stand next to the Judge?

6 A. Yes.

7 Q. Okay. And the only other thing I
8 usually ask the witnesses I depose, is if I ask
9 you a question and you answer it, um, is it
10 okay for me to assume that you both understood
11 my question and that the answer you gave was
12 your complete answer as much as you can
13 remember per the question?

14 A. Yes. Can I give a caveat?

15 Q. Absolutely.

16 A. It's been 7 years or --

17 Q. Of course.

18 A. -- more since the event, and so I am
19 doing my best to remember. Sometimes things
20 come up later that I would have corrected. But
21 so it's not intentionally trying to withhold or
22 be incorrect, but I do think that just with the

1 passage of time some of the memory is not as
2 sharp.

3 Q. That is fine, and that is fair. And
4 this isn't --

5 We want you to tell us what your
6 best memory is, and that's all we can ask.

7 A. Okay.

8 Q. And at the same time, if you leave
9 something out and you think of it on a break or
10 later and you want to make sure that you make
11 the record clear and let me know information
12 that you forgot to say -- which is what it is.
13 It's just forgetting. I know you're not trying
14 to conceal anything -- then just let us --

15 -- let me know and we can address
16 it. Fair enough?

17 A. Yes.

18 Q. I want to mark some documents. We
19 have a lot documents possibly to go through, so
20 I want to try to start going through them.
21 We'll start with No. 1.

22

1 (Exhibit 1 presented for
2 identification.)

3 This is the deposition notice.

4 Colonel, have you seen this before?

5 This is essentially the subpoena we sent
6 through your U.S. Attorneys to ask you to come
7 testify.

8 A. I don't know that I saw this
9 document. I know that it's --

10 The corpus of it was conveyed to
11 me --

12 Q. Okay.

13 A. -- and I took people at their word.

14 Q. All right.

15 Sorry. I meant to give you a copy
16 of that.

17 You can leave that there.

18 And I think I asked you this. I
19 think I asked you this at the very beginning
20 off the record, so I just want to get it on the
21 record. We only asked for two things. We
22 asked for you to bring your Curriculum Vitae,

1 your CV, if you have one.

2 A. I forgot it.

3 Q. Okay.

4 A. I apologize.

5 Q. It won't be hard for you to get it
6 to Mr. Stern or Mr. Furman, and they can give
7 it to us. Is that o --

8 Is that fair enough?

9 A. Yes.

10 Q. Okay. We also asked you to bring
11 any documents that you might have reviewed and
12 looked at in specific preparation for this
13 deposition. And my understanding is that you
14 did not bring any documents.

15 A. I did not.

16 Q. Okay.

17 MR. FURMAN: And we instructed him
18 not to bring any documents.

19 BY MR. ALSAFFAR:

20 Q. Okay. And the follow-up to that
21 question is -- well, I guess I have two now --
22 so did you review any documents, and

1 specifically in preparation for this
2 deposition?

3 A. Specifically in preparation for this
4 deposition, no.

5 Q. Okay.

6 A. And when I learned about the case I
7 looked at our court martial --

8 (Discussion with the Court
9 Reporter.)

10 MR. ALSAFFAR: Can you say that --

11 THE WITNESS: I looked at our court
12 martial order, the promulgating order from our
13 trial. That was --

14 I think that was shortly after I had
15 learned of the event.

16 BY MR. ALSAFFAR:

17 Q. Okay. Anything else you looked at
18 between your learning of the event and today?

19 A. No. For preparation, no.

20 Q. Okay. Any other purposes? For your
21 interviews with the DODIG, for your interviews
22 with investigators at the Air Force, et cetera.

1 A. There were a few references with the
2 attorneys earlier today --

3 Q. Uh-huh.

4 A. -- where I think that they looked at
5 some dates on the report of result of trial.

6 Looked at dates on the report of
7 result of trial and on the preferral of
8 charges.

9 Q. Can you tell me what the preferral
10 of charges is.

11 A. Yes.

12 MR. FURMAN: Jamal, do you want the
13 Bates numbers for those?

14 MR. ALSAFFAR: That would be great.
15 Yeah.

16 MR. FURMAN: Okay.

17 MR. ALSAFFAR: Go ahead.

18 THE WITNESS: In general when a
19 person is --

20 When charges are sworn to --

21 MR. FURMAN: Hold on one second if
22 you don't mind, Colonel.

1 THE WITNESS: No problem.

2 MR. FURMAN: I just want to clear
3 that up first.

4 The documents --

5 Jamal, I'm assuming going forward --

6 And maybe we should discuss off the
7 record how we want to handle depositions as far
8 as --

9 MR. ALSAFFAR: Yes. We'll do that
10 off the record.

11 MR. FURMAN: So the documents that
12 were reviewed in preparation for deposition
13 with the Colonel, USA15086 through 15092, which
14 is the charge sheet; we reviewed the plea
15 agreement, USA12850 through 12854; the general
16 court martial order, USA12877 through 12881 --

17 MR. ALSAFFAR: I'm sorry. 12881?

18 MR. FURMAN: Correct.

19 MR. ALSAFFAR: Okay.

20 MR. FURMAN: -- the report of result
21 of trial, which is USA13356 through 13359;
22 letter concerning Sanity Board request --

1 MR. ALSAFFAR: I'm sorry.

2 Concerning?

3 MR. FURMAN: Sanity Board request.

4 -- USA15073 through 15083; we
5 reviewed the Devin Kelley stipulation of fact,
6 which I don't have the Bates number for that,
7 but --

8 MR. ALSAFFAR: The one that we filed
9 with the Court.

10 MR. FURMAN: No. I'm sorry. The
11 stipulation of fact from the Kelley
12 prosecution.

13 MR. ALSAFFAR: Okay. How many pages
14 is that?

15 MR. FURMAN: That's three.
16 If you want to look at it.

17 MR. STERN: Take your tab off,
18 please.

19 MR. ALSAFFAR: Here. Take it off.
20 Trying to be nice.

21 Strike one. You get three nice's
22 from me; that's it.

1 All right. Thank you.

2 MR. STERN: Per dep? Or per case?

3 MR. ALSAFFAR: I'm not going to
4 answer that question. I don't have to.

5 Okay. Do you --

6 (Discussion off the record.)

7 Do you all need to take a quick
8 break?

9 MR. FURMAN: Yeah, if you don't
10 mind.

11 MR. STERN: Yeah, let's take 5.

12 MR. ALSAFFAR: That's fine. It's
13 almost been an hour.

14 MR. STERN: And we're going to put
15 it on mute on the phone.

16 THE VIDEOGRAPHER: Going off the
17 phone at 14:11.

18 (Recess taken.)

19 (Deposition resumed.)

20 Going back on the record at 14:20.

21 MR. FURMAN: Jamal, thanks for the
22 break. I just wanted to --

1 I think the Colonel was a bit
2 confused by your question, so I wanted to make
3 sure we jump in and make sure we're all on the
4 same page. So we just wanted to point out the
5 documents the witness relied upon for this
6 deposition. And the Colonel was referring to
7 another document, and that's in the list we
8 provided to you, so that's USA12879. On the
9 top of it, it says: DNA processing required
10 and crime of domestic violence --

11 (Discussion with Court Reporter.)

12 -- and crime of domestic violence.

13 So it has those headings. And that was
14 contained within the Bates ranges I gave you
15 before.

16 MR. ALSAFFAR: Okay. Got it.

17 BY MR. ALSAFFAR:

18 Q. All right. You need to --

19 You need to look at something? You
20 can look at anything.

21 A. No. I just didn't know if we were
22 off mute.

1 Q. Oh, yes. Thank you. Thank you.

2 Okay. We're back on the record.

3 Um, I've got --

4 You had just told me that one of the
5 documents you reviewed in preparation for your
6 deposition was the stipulated facts for the
7 trial of Devin Kelley, and it was Bates stamped
8 USA16922. And that record is now up in front
9 of you on the screen, correct?

10 A. Yes.

11 Q. And is that the record that you were
12 referring to?

13 A. I briefly glanced at this. I didn't
14 go through it in detail, but yes, that's the
15 document.

16 Q. Okay. And it's titled Stipulation
17 of Facts, November 5th, 2012. Is that correct?

18 A. Yes.

19 Q. So these are the stipulations that
20 Devin Kelley and his attorney entered into with
21 your JAG Department during the trial of his
22 assault, correct?

1 A. Yes.

2 Q. Okay. And just real quick, you see
3 I'm going to --

4 You see the page, we're on Page
5 16923. You see that? Is that up in front of
6 you?

7 A. No. I see Page 2 of 3, but I don't
8 see --

9 Q. Okay. How about now?

10 A. Yes.

11 Q. Okay. Item No. 9 is, says, states:
12 The video contained on Prosecution Exhibit 4 is
13 a video of the accused confessing to physically
14 abusing JL on April 27th, 2012.

15 Do you see that?

16 A. Yes.

17 Q. And JL is a minor child; that's why
18 it's blacked out there, correct?

19 A. Yes.

20 Q. The video was created by the
21 accused, and the file contained on Prosecution
22 Exhibit 4 is a true and correct copy of this

1 video. The accused made this confession in
2 part so that Tessa Kelley could retain custody
3 of JL.

4 Do you see that?

5 A. Yes.

6 Q. Do you remember that video --

7 A. Yes.

8 Q. -- confession? Okay.

9 And I'm assuming --

10 Is it fair for me to assume that you
11 reviewed that video in question at the time
12 closer to these events in this record?

13 A. Yes. That's the only time I have
14 reviewed it.

15 Q. Okay. And it's fair to say that it
16 was marked as an exhibit in the trial of Devin
17 Kelley, correct?

18 A. Yes.

19 Q. And where did you review the video?
20 Which office?

21 A. I think I reviewed it in the base
22 legal office.

1 Q. Which is located where on Holloman?

2 A. It's in the Headquarters building.

3 I don't know the address.

4 Q. Okay. Headquarters building located
5 on Holloman Air Force Base?

6 A. Yes.

7 Q. And one of the things I always like
8 to know and understand is sort of where things
9 are in relation to the other, and that includes
10 buildings and offices because I have yet --

11 -- not yet have been to Holloman Air
12 Force Base. Would you mind telling me where is
13 the AFOSI and 49th Security Forces' offices in
14 relation to the Staff Judge Advocate's offices
15 on Holloman Air Force Base at the time you were
16 involved in the Devin Kelley investigation.

17 A. At the time I was involved, the Air
18 Force Office of Special Investigations office
19 was probably about 3 or 4 blocks away if I'm
20 remembering correctly. Security Forces
21 probably the same distance, but I don't think
22 they were close to each other.

1 Q. When you say Security Forces were
2 about the same distance, do you mean about the
3 same distance from the Staff Judge Advocate's
4 office or from the --

5 A. I don't --

6 Q. -- AFOSI?

7 A. I don't remember exactly where
8 Security Forces' office was.

9 Q. Was the --

10 So all three offices -- Staff Judge
11 Advocate, Security Forces, and Office of
12 Special Investigation -- all located on
13 Holloman Air Force Base, correct?

14 A. Yes.

15 Q. Are they all located within walking
16 distance of each other?

17 A. Good walk. I know that people often
18 drove --

19 Q. Okay.

20 A. -- especially depending on the
21 weather.

22 Q. Okay. How long does it take to get

1 from the Staff Judge Advocate's office to the
2 Holloman Air Force Base Security Forces'
3 office, first the 49th?

4 A. Again, I don't remember exactly
5 where that one was located. It was farther, if
6 I'm correct, than OSI. OSI was -- if you're
7 walking -- 5 minutes.

8 Q. Okay. And the Security Forces Wing,
9 49th Wing, was it a long drive? 25 minutes?
10 20 minutes? Less?

11 A. It would have been less.

12 Q. Okay. Um, one of the questions I
13 don't think I asked you as it related to your
14 service as a Staff Judge Advocate, did you
15 have -- this is at Holloman Air Force Base
16 during Devin Kelley's investigation and
17 conviction -- did you have a supervisory role
18 as Staff Judge Advocate?

19 A. Did I supervise other attorneys?

20 Q. Yes.

21 A. Yes.

22 Q. Okay. Could you describe what your

1 supervisory role was in terms of monitoring
2 other Advocate --
3 -- Judge Advocates and training
4 them, if any.

5 A. As the Staff Judge Advocate we would
6 be responsible for the professional
7 responsibility and also training within the
8 office.

9 Q. Uh-huh.

10 A. I had a --
11 My Deputy, who was a Major, was in
12 charge of our training program, and I had a
13 Superintendent, a Tech Sergeant, who was in
14 charge of training enlisted, and we had
15 training programs, training folders that we
16 would work with. We also did a lot of
17 on-the-job training with cases. We would work
18 through trial notebook reviews. We would work
19 through case analysis, case strategies. We
20 would look at practicing opening statements,
21 closing arguments, sometimes Voir Dire.

22 Q. I think you meant to say Voir Dire,

1 but I'll let it pass (laughing.)

2 A. It looks the same on the --

3 Q. Let me go back to the supervisory
4 role. Did you have any kind of supervisory
5 role in monitoring and/or training your Judge
6 Advocates on how to work with the OSI Agents
7 and the Security Forces Agents in conducting
8 criminal investigations in determining probable
9 cause and in then ultimately prosecuting those
10 cases?

11 MR. FURMAN: You're asking him a
12 very compound question. It might be easier
13 just to break them up.

14 MR. ALSAFFAR: Why don't you go
15 ahead and --

16 THE WITNESS: I'll try to break it
17 up.

18 MR. ALSAFFAR: Yeah. And then I'll
19 narrow it if I need to.

20 MR. FURMAN: I'll object to the
21 form.

22 You can answer.

1 MR. ALSAFFAR: Yeah, yeah. Go
2 ahead.

3 THE WITNESS: With regard to
4 investigations working with OSI, I would --

5 -- we would talk about how to do
6 this. We would train on --

7 I remember we'd set up regular
8 meetings between --

9 I think that there was a weekly
10 meeting that our Chief of Justice and our often
11 Deputy in the Justice section would go to with
12 the OSI to review cases. We had an on-call JAG
13 training that if they would call with different
14 questions on search and seizer or other types
15 of issues that would pop up that would require
16 legal analysis, which included probable cause,
17 we trained on those things.

18 MR. ALSAFFAR: Okay.

19 THE WITNESS: We would often --

20 MR. ALSAFFAR: Go ahead.

21 THE WITNESS: We would often discuss
22 different issues they had after the fact if

1 someone had a call in the middle of the night.
2 We had weekly attorney meetings. We had weekly
3 section meetings where we would discuss a lot
4 of those things as well.

5 BY MR. ALSAFFAR:

6 Q. Was there a difference between a
7 weekly attorney meeting and a weekly section
8 meeting?

9 A. Yes.

10 Q. What's a section meeting?

11 A. A section meeting would be with the
12 different divisions we had in the office,
13 either our general law section or our military
14 justice section or our claims section. In the
15 attorneys meeting we would have all of our
16 attorneys. We had for the most part four
17 Captains, one Major, and me, and two civilian
18 attorneys. And we would discuss all the areas
19 of law, including international law, our
20 general law divisions, and then we'd break down
21 those different departments into sections and
22 talk more specifically about the different

1 areas that they were practicing working at that
2 time. We also had an office meeting where we
3 would discuss more items of common interest or
4 we would conduct training that would apply both
5 to paralegals and to attorneys.

6 Q. Did you conduct any supervisory
7 training for your Judge Advocates on
8 determining and helping determine probable
9 cause for purposes of submitting fingerprint
10 submissions?

11 A. I don't recall that.

12 Q. Okay. So you don't recall providing
13 any training to Judge Advocates on determining
14 probable cause?

15 A. I don't know if it did not happen.
16 I just don't recall specifically.

17 Q. Did you specifically receive any
18 training as a Staff Judge Advocate, either at
19 Holloman or before you came to Holloman,
20 regarding --
21 -- regarding the determination of
22 probable cause for collection and submission of

1 fingerprints to the FBI?

2 A. I do not recall receiving specific
3 training on that. I do recall encountering the
4 issue as Chief of justice at Hickam Air Force
5 Base in Hawaii.

6 Q. Can you say that last part again.

7 "I do recall -- "

8 A. -- encountering the issue. It was
9 rare, but I do remember that as Chief of
10 Justice I would discuss at times these types of
11 issues with --

12 -- it was either Security Forces or
13 OSI. I don't recall which.

14 Q. Okay. And when you're talking about
15 these issues, you're saying that you had
16 some --

17 -- that on-the-job training that you
18 had at Hickam Air Force Base in training on the
19 collection and reporting of fingerprints to the
20 FBI?

21 A. I wouldn't say it that way. I would
22 say that I encountered the issue. People asked

1 me the question, and I went through that issue
2 and handled the issue as it arose, but I don't
3 recall any formal training.

4 Q. Okay. And that's what actually my
5 question was. You did not have any formal
6 training that you can remember, that you can
7 recall from the Air Force on how to train or --
8 either Judge Advocates or yourself -- on the
9 determination of probable cause for submission
10 of fingerprint data to the FBI?

11 A. For that limited purpose that's
12 correct.

13 Q. Okay.

14 A. I do remember training on probable
15 cause determinations and the law of probable
16 cause.

17 Q. So you do remember having general
18 probable cause training in terms of the law
19 generally, correct? But you don't recall
20 having any training from the Air Force or
21 providing any training to your subordinates
22 relating to determination of probable cause for

1 the collection and submission of fingerprint
2 data on military members?

3 A. I think that's fair.

4 Q. That's fair?

5 A. Yes.

6 Q. So it's a correct statement?

7 A. Yes.

8 Q. Okay. One of the questions that I
9 wanted to ask you that we had touched on
10 earlier in terms of your career was sort of the
11 general discussion we had just in terms of how
12 you interacted with the actual agents -- the
13 Case Agents or Special Agents and Security
14 Forces Agents -- who were doing the
15 investigations on military members. Do you
16 remember that discussion that we had?

17 A. Yes.

18 Q. Okay. And I think you just told us
19 that one of the things that you did --

20 And let's limit this to during your
21 time at Holloman Air Force Base when Devin
22 Kelley was prosecuted and investigated while

1 you were there.

2 A. Yes.

3 Q. That's what I'm asking you about.

4 -- that your office, the Staff Judge

5 Advocate office would have regular meetings

6 with the Case Agents, both OSI and the 49th

7 Security Forces, on Holloman Air Force Base

8 regarding their cases?

9 A. Yes. Can I clarify?

10 Q. Absolutely.

11 A. Independently. We didn't often have

12 meetings with both of them on their cases

13 specifically. Sometimes that could occur. It

14 wasn't me specifically that would do it, but

15 typically there was weekly meetings. When you

16 say "my office", it was individuals within my

17 office -- usually it would be from our Justice

18 section -- and that would usually consist of

19 one to two attorneys and usually maybe one

20 paralegal would go to that, and that would be

21 the interaction.

22 Q. Okay. So let's break that down a

1 little bit. Your --

2 And when I say "your office", I'm
3 talking about Staff Judge Advocate's office,
4 which you were the boss of that office. Fair
5 to say?

6 A. Yes.

7 Q. Okay. So your office Assistant
8 Judge Advocates or Assistant Staff Judge
9 Advocates would hold weekly meetings with OSI
10 separately and also 49th Security Forces
11 separately, correct?

12 A. Yes. And I don't recall whether it
13 was weekly with Security Forces. Sometimes
14 they didn't have as many cases.

15 Q. Okay. And would those meetings
16 involve in part reviewing active case files
17 that the agents at OSI and Security --
18 -- 49th Security Forces were
19 actively investigating?

20 A. Yes.

21 Q. Okay. And that would include Devin
22 Kelley's case, correct?

1 A. Yes.

2 Q. All right. Um, would your Staff
3 Judge Advocates --

4 I'm sorry. Your Assistant Judge
5 Advocates, Assistant Staff Judge Advocates
6 report back to you after those meetings to let
7 you know how those investigative case files
8 were doing?

9 A. Yes. With a twist.

10 Q. Okay.

11 A. It was more in the context we would
12 take that into our Justice meeting and we would
13 talk about what was going on in those cases and
14 how we would then take the case and progress.

15 With regard to Airman Kelley, if I'm
16 correct, the investigation was pretty much
17 wrapped up by the time I got there, so I don't
18 think there was a lot of updates that were
19 coming out of those meetings.

20 Q. Okay.

21 A. So other cases.

22 Q. You said "with a twist". What's the

1 twist?

2 A. With the twist was they wouldn't
3 come back and report to me exactly what OSI was
4 doing; they would synthesize that information
5 into where we were on the investigation as it
6 pertained to our office, and what steps would
7 be next for us as a legal office, whether we
8 could interview witnesses, whether we could
9 prefer charging or move on with the disposition
10 of a case.

11 Q. Was one of the things that -- and
12 let me make sure I understand -- that you're
13 saying that your attorneys that worked
14 underneath your supervision and training would
15 report back to you as it related to the Judge
16 Advocate's job duties. Is that what you mean
17 by that?

18 A. We would talk about what was going
19 on in the investigation. But again, most of it
20 had to do with what our role in that
21 investigation would be.

22 Q. Okay. Um --

1 A. That would be the primary focus of
2 our discussions.

3 Q. My understanding --

4 And we'll look at the instructions
5 right now, actually. Why don't we just do that
6 right now. Let me hand you Exhibit No. 2.

7 (Exhibit 2 presented for
8 identification.)

9 Colonel Tullos, is it Tu-llos or
10 Tull-os?

11 A. Tullos.

12 Q. Tullos. Okay. How about if I just
13 call you "Colonel". Is that all right?

14 A. That will be fine.

15 Q. I don't want to mispronounce your
16 name.

17 I'm handing you Exhibit No. 2. And
18 I want to orient you just a little bit since
19 we'll be looking at exhibits. If you see on
20 the bottom right, do you see the Bates stamp on
21 the bottom right that has a USA number along
22 with a long number there at the bottom?

1 A. Yes.

2 Q. Okay. The reason I'm pulling --
3 -- bringing that to your attention
4 is I'm simply not sure how much experience as
5 an attorney on the criminal side you have with
6 discovery in civil cases. So when you see a
7 USA number there on the bottoms of these
8 documents, that means that the United States of
9 America and the U.S. Attorney's Office from the
10 Department of Justice have provided those
11 records to us from their offices relating to
12 discovery that we've requested, or in other
13 words, like subpoenas that we've requested for
14 relevant documents. So that's what that Bates
15 number means. It means the USA found these and
16 gave them to us. Fair enough?

17 Okay. I want you to look at --

18 Are you familiar with this
19 instruction, by the way?

20 A. Yes.

21 Q. Okay. Tell me just generally your
22 familiarity with DODI Instruction 5505.11.

1 A. Many issues come our way --

2 Q. Yes, sir.

3 A. -- and we will look up the guidance
4 and instructions. I've come across this a
5 number of times in my career.

6 Q. Okay. And so just for the record,
7 you've come across DODI 5505.11 many times in
8 your career?

9 A. Well, no. A number of times.

10 Q. A number. I'm sorry.

11 A. And I would say that --

12 A number of times.

13 Q. Okay. That's fine.

14 And how would you in the operation
15 of your duties as a Staff Judge Advocate at
16 various Air Force Bases, including Holloman,
17 how would you come across, how would this
18 instruction play or be relevant in what you
19 were doing?

20 A. I don't recall specifically how we
21 used it at Holloman.

22 Q. Okay.

1 A. And it was --

2 This is the type of thing that if an
3 attorney were asked a question, they would go
4 back to the references. And it would possibly
5 be in the continuity books for the sections
6 that we discussed.

7 Q. Okay. And would this be --

8 Remember earlier in the deposition
9 when I was going through the litany of your
10 experience at all of your duty stations, and I
11 was asking you at those various duty stations
12 you would have to be familiar with the
13 instructions and manuals from the Department of
14 Defense and Air Force that would apply to
15 investigations. Do you remember that
16 conversation?

17 A. Yes.

18 Q. Okay. And this is one of those
19 instructions that I was referring to. And is
20 that one of the instructions that you would
21 have understood that you would have been
22 familiar with in your various duties?

1 A. In general, yes. And I'll offer we
2 practiced about 12 different areas of law under
3 my supervision at that time.

4 Q. Okay. When I do this (indicating),
5 that means slow down a bit. When I do this
6 (indicating), speak up a bit. Is that fair?
7 Again, I'm not being rude, I just want to make
8 sure because I'm trying to help her. I'm
9 trying to play her --

10 -- help her out too.

11 Okay. So let's look at page --

12 -- the first page, which is USA1806.

13 Now first of all -- and please look at it --
14 but DOD 5505.11 is a mandatory instruction. Is
15 that correct?

16 A. Yes.

17 Q. Okay. And that means that to the
18 extent that these apply to various folks within
19 the Air Force specifically, and investigating
20 military members, the instructions in here mean
21 you have to follow them. You don't have any
22 discretion to not follow these rules, correct?

1 A. That's correct.

2 Q. Okay.

3 I'm sorry. What was the answer?

4 A. That's correct.

5 Q. Okay. Let's look at Paragraph (b).

6 It says: This instruction establishes policy,
7 assigns responsibilities, and prescribes
8 procedures in accordance with 2028 of the Code
9 of Federal Regulations and Section 534 of Title
10 28, United States Code (References (c) and (d))
11 for Defense Criminal Investigative
12 Organizations (DCIOs) and other DOD law
13 enforcement organizations to report offender
14 criminal history data to the Criminal Justice
15 Information Services (CJIS) Division of the
16 Federal Bureau of Investigation (FBI) for
17 inclusion in the National Crime Information
18 Center criminal history database.

19 Did I read that long paragraph
20 correctly?

21 A. Yes.

22 Q. Okay. And that's one of the

1 mandatory instructions, correct?

2 A. Yes.

3 Q. Now --

4 MR. FURMAN: Jamal, do you want to
5 be clear on the time period for that
6 instruction. I know it has changed --

7 MR. ALSAFFAR: I've got the Bates
8 numbers so it's fine. It's in the record. The
9 Bates number says and we'll let you know which
10 dates it is.

11 MR. FURMAN: I just want to make
12 sure the Colonel is clear.

13 MR. ALSAFFAR: It's on there. It's
14 on the first page.

15 BY MR. ALSAFFAR:

16 Q. Okay. So you were at Holloman Air
17 Force Base in 2012, correct.

18 A. That's correct.

19 Q. Now in terms of the procedures, that
20 paragraph I just read, tell me what's your
21 understanding --

22 -- what is your understanding of

1 DCIO? What are those?

2 A. Defense Criminal Investigative
3 Organizations would be primarily the Office of
4 Special Investigations. There might be
5 Security Forces Investigative Services under
6 that. I don't remember the definition, whether
7 it specifically includes them. I know it
8 includes the Office of Special Investigations.

9 Q. What about DOD law enforcement
10 organizations?

11 A. That would probably be where
12 Security Forces falls.

13 Q. Any other --

14 Any other organizations that might
15 fall under DCIO and DOD law enforcement
16 organizations?

17 A. Not that I can --

18 No.

19 Q. Okay. If you look at --

20 A. Well --

21 Q. Oh. Sorry. Go ahead.

22 A. You mean within the Air Force? Or

1 outside of the Air Force?

2 Q. Both.

3 A. Outside of the Air Force the
4 equivalent in the Navy, the National --

5 -- the NCIS, the CID for the Army.

6 Those types of organizations. But within the
7 Air Force, no.

8 Q. Okay. Now, look at Paragraph (d).

9 I'm going to start with a couple of lines down.

10 It says: These procedures advance the
11 requirement to submit offender criminal history
12 data to the CJIS Division from the point when
13 charges are referred to an earlier point when
14 an agent or other law enforcement investigator
15 determines, following coordination with the
16 servicing Staff Judge Advocate (SJA) or legal
17 advisor if necessary, that probable cause
18 exists to believe that the subject has
19 committed an offence listed in Enclosure 2 of
20 this instruction.

21 A. Yes.

22 Q. Did I read that correctly?

1 A. Yes.

2 Q. Okay. And I want to talk a little
3 bit about that.

4 A. Okay.

5 Q. So first of all, you understand
6 that --

7 And you can look if you want, if you
8 flip to Page 1811 of the instruction, and go to
9 No. 33. Article 128 - Assault, is one of the
10 listed reportable offences in Enclosure 2 of
11 this mandatory instruction. Is that right?

12 A. Yes.

13 Q. Okay. And that's the charge that
14 Devin Kelley was charged with and also
15 convicted on, correct?

16 A. Yes.

17 Q. Okay. Now, in Section (d) this
18 mandatory section asks that the law enforcement
19 investigator determines probable cause in
20 consultation with the Staff Judge Advocate.

21 Is that right?

22 A. Right.

1 MR. FURMAN: Objection to form.

2 You can answer.

3 MR. ALSAFFAR: Go ahead.

4 THE WITNESS: If necessary it says.

5 BY MR. ALSAFFAR:

6 Q. Okay. So there will be some
7 instances where the -- it's my understanding,
8 but I want you to tell me your understanding --
9 in some instances a law enforcement
10 investigator like an OSI or 49th Security
11 Forces investigator can make their own
12 determination of probable cause to submit
13 fingerprints to the FBI.

14 A. Yes, that's correct.

15 Q. Okay. So when you have those
16 meetings with --

17 I believe you said they were weekly
18 meetings with the Judge Advocates and the
19 agents and the law enforcement organization of
20 OSI and 49th Security Wing. Do you remember
21 that?

22 A. Yes.

1 Q. Okay. When you had those weekly
2 meetings in your office -- and when I say
3 "you", I mean your office -- this mandatory
4 instruction consultation with SJA, probable
5 cause discussions, was that something that you
6 all discussed in those weekly meetings that
7 you're aware of?

8 A. I do not know. I did not attend
9 those meetings except by --

10 It was an exception. I only
11 attended them maybe one every 2 or 3 months, if
12 that. I don't recall the specific instructions
13 or specific conversations.

14 Q. Okay.

15 A. I wouldn't know if they did discuss
16 it when I was not there.

17 Q. Okay. You had told me earlier I
18 believe, just a few minutes ago, about these
19 meetings that your Judge Advocates would go to
20 with these investigating agents at Holloman,
21 and that they would come back and report back
22 to you in some fashion about those meetings and

1 those case files. Is that --

2 A. Right. And that's when I mentioned
3 with a twist. It was not --

4 They weren't just coming back and
5 saying --

6 -- telling me everything that
7 occurred in that meeting. It was they were
8 taking the information that they received from
9 OSI and they were looking at our
10 responsibilities. That's what primarily would
11 be our discussions, and --

12 Go ahead.

13 Q. Okay. Anything else on that?

14 A. That's fine.

15 Q. Okay. So do you recall while you
16 were at Holloman Air Force Base -- and this is
17 for all cases, not just Devin Kelley -- do you
18 recall that whether or not the Judge Advocates
19 would ever come back and report to you about
20 the investigative officers' understanding and
21 training of when and how to collect, store and
22 report fingerprints of folks they were

1 investigating?

2 MR. FURMAN: Objection to form.

3 THE WITNESS: I don't recall.

4 BY MR. ALSAFFAR:

5 Q. And do you not recall either way?

6 Or do you not know? Are you saying: I

7 don't --

8 -- I don't think they ever --

9 -- we ever had those discussions?

10 MR. FURMAN: Objection to form.

11 You can answer.

12 MR. ALSAFFAR: Go ahead.

13 THE WITNESS: I don't recall well
14 enough to know whether it would exclude that
15 possibility. So I just --

16 I don't recall those specific
17 conversations --

18 MR. ALSAFFAR: Okay.

19 THE WITNESS: -- with regard --

20 MR. ALSAFFAR: All right.

21 THE WITNESS: It's not that they
22 could not have happened.

1 BY MR. ALSAFFAR:

2 Q. They could have happened, you just
3 don't recall whether when they reported back to
4 you, you addressed it.

5 Let me ask a different question.

6 A. Okay.

7 Q. As the trainer/supervisor of these
8 Judge Advocates did you ever specifically
9 inquire -- and this is for all investigations
10 at Holloman, not just Devin Kelley -- did you
11 ever specifically inquire: Hey Judge
12 Advocates, are you all making sure that these
13 agents understand the reporting requirements
14 under probable cause and that we're not holding
15 back fingerprints that should be reported to
16 the FBI?

17 A. I do recall conversations about
18 probable cause.

19 Q. Okay.

20 A. I do not recall specifically the
21 application of that probable cause, whether it
22 was with regards to the fingerprints or search

1 and seizure issues or other aspects.

2 Q. Including reporting of those
3 fingerprints?

4 A. I don't recall. I remember having
5 probable cause discussion and training, but not
6 specifically with regard to reporting.

7 Q. And would you include in that when
8 we talk about the agents understanding of
9 collection, storage and reporting of
10 information, that that includes also what's
11 called final disposition reports after a
12 conviction?

13 A. Right.

14 Q. Are you familiar with that term,
15 final disposition report?

16 A. Yes.

17 Q. Are you familiar with the R-84 and
18 249 reports?

19 A. Not the forms specifically. I don't
20 know the numbers.

21 Q. Okay. So there is the fingerprint
22 report, card or electronic, that is sent to FBI

1 on occasion, correct?

2 A. Yes.

3 Q. And then there's also a final
4 disposition report that is also supposed to
5 include the fingerprints if there's been a
6 conviction reported back to these law
7 enforcement agencies, like the OSI or 49th
8 Security Forces, correct?

9 A. Yes. But I just have vague
10 knowledge with regard to those things.

11 Q. Okay. Um, so in one --

12 And this is important because I'm
13 not going to get another bite at the apple with
14 you I don't think -- or at least you hope so --
15 but that's usually the way it goes. And so I'm
16 just trying to find out what you know. And so
17 is it fair for me to understand that you're not
18 going to --

19 As you sit here today you don't have
20 any memory that you specifically trained your
21 Judge Advocates or supervised them specifically
22 on how to determine probable cause for

1 reporting of fingerprints or reporting
2 specifically of convictions?

3 MR. FURMAN: Objection to form.
4 You can answer.

5 THE WITNESS: I don't recall
6 specifically training on that. I do recall
7 training on probable cause determinations. And
8 the standard of probable cause applies -- as
9 far as our legal standard and case law -- the
10 definition applies with probable cause every
11 time you're using that. It just has different
12 applications whether it's with regard to search
13 authority or a warrant in a civilian
14 counterpart --

15 MR. ALSAFFAR: Okay.

16 THE WITNESS: -- whether it would be
17 at a point where we believe that there is
18 enough information to show that an individual
19 committed an offence, or whether it was enough
20 to proceed to a different stage in a
21 disciplinary proceeding.

22 MR. ALSAFFAR: Okay.

1 THE WITNESS: So we did train on
2 probable cause. I don't recall specifically
3 training on probable cause as it pertained to
4 this, but it would have been that same legal
5 standard that would be applied to any of these
6 questions.

7 BY MR. ALSAFFAR:

8 Q. Great. That's helpful.

9 So let me break that down so I make
10 sure I get it accurate. So it's two parts I
11 think. So first, you have no recollection that
12 you ever trained or provided supervisory
13 oversight with your Judge Advocates or the case
14 agents at OSI or 49th, specifically on how to
15 apply probable cause determinations for
16 fingerprint reporting and conviction reporting
17 and final disposition reports, correct?

18 MR. FURMAN: Objection to form.

19 You can answer.

20 THE WITNESS: I do recall some
21 training, not necessarily on the final
22 disposition report for the OSI, but on our

1 documents that we provided to OSI with regard
2 to a court martial promulgating order or record
3 of report of trial, so part of that going over
4 to the OSI. I don't know if I --

5 I don't recall training on the
6 secondary part that OSI would take.

7 BY MR. ALSAFFAR:

8 Q. Okay. And we're just going to keep
9 breaking these down so I understand the various
10 categories.

11 Let me try a different tact on that.
12 You do recall just generally studying generally
13 training and supervising your Judge Advocates
14 on the meaning of the general legal standard
15 and definition of probable cause, correct?

16 A. Yes. We train on that fairly often
17 because that's something that we get called in
18 the middle of the night on --

19 Q. Sure.

20 A. -- or as we move the case along. So
21 yes.

22 Q. And your understanding or your

1 belief is that that general legal standard
2 definition of probable cause is the same
3 definition, whether it's for a case not
4 involving fingerprint reporting or disposition
5 reporting, or whether it does involve it?

6 A. Right. Reasonable grounds exist
7 that either a crime occurred or that evidence
8 of a crime exists in a certain location.

9 Q. Okay.

10 A. And it's a fact determine --
11 -- a fact dependent determination.

12 Q. So your definition or understanding
13 of the definition of probable cause is a
14 reasonable grounds exists that a crime could
15 have occurred or that evidence to investigate a
16 crime is available?

17 A. That a crime did occur.

18 Q. Okay.

19 A. And that evidence exists and is in a
20 location as it pertains to a warrant.

21 Q. Okay. So your probable cause
22 definition is reasonable grounds exist that a

1 crime did occur or evidence exists at a
2 location specifically.

3 A. Again, depending on the application
4 we're talking about. If it's a warrant or a
5 search authorization, and it has to be a crime
6 occurred and evidence in that crime exists in
7 this place. Reasonable grounds is something
8 more than a mere suspicion. There has to be
9 evidence, and there has to be a logical chain
10 that leads them to believe those things.

11 Q. Okay.

12 A. And I guess if you're getting into
13 it, then an investigator's experience and
14 training are allowed to factor into that as
15 well. We use the cases that discuss probable
16 cause to develop that.

17 Q. Okay. You also said that you have
18 your Staff Judge Advocate office has documents
19 on the record of report of trial that relate to
20 training on probable cause as they relate to
21 reports of trial, or something along those
22 lines. Do you remember that?

1 Can you explain that to me.

2 A. I don't know if we have --

3 -- when you say we have records of
4 that training. I would say we would train on
5 it, and we usually did it in the terms of
6 there's checklists on every case that we have
7 to run, there's instructions that are
8 referenced in those checklists, we have people
9 that are working and overseeing. I know that
10 in many situations my Deputy was getting in
11 many of the hands-on issues with regard to
12 Justice about this timeframe.

13 Q. Okay. And would that be training on
14 probable cause as it relates to the report of
15 trial conviction, would that be training you
16 would provide just to the Judge Advocates? Or
17 did you also provide it to the OSI or Security
18 Forces agents?

19 A. We primarily provide it to the Judge
20 Advocates and paralegals. But with the
21 probable cause with the report of result of
22 trial, there was a conviction at that point or

1 an acquittal at that point.

2 Q. So if there's a conviction on a
3 report of result of trial, what you're doing is
4 filling out that form correctly and sending it
5 to the OSI or/and the Security Forces Wing at
6 Holloman to inform them of the conviction?

7 A. Yes.

8 Q. Okay. Do you do anything else
9 other --

10 How do you send that information of
11 a report of trial conviction? How did you send
12 that information when you were working as the
13 SJA at Holloman Air Force Base?

14 A. I don't know specifically whether it
15 was transmitted electronically or a paper copy.
16 I don't know specifically.

17 Q. And so your memory is when you were
18 working at Holloman Air Force Base it was a
19 report of result of trial convictions would be
20 sent either by hard copy mail or electronic
21 e-mail. Is that how you would send it over?

22 A. Yes. Or both. I just don't recall

1 specifically.

2 Q. And the reason I'm asking about
3 e-mail -- and I didn't know if that's true. I
4 don't know if you download it onto a server or
5 a file share program -- when you say I
6 electronically --

7 -- maybe we electronically sent a
8 report of result of trial, would it be
9 electronically e-mailed to a specific agent or
10 agents at OSI and the 49th?

11 A. Again, I don't know. I don't recall
12 whether we did it one way or the other. I do
13 think we're required to mail it, a hard copy
14 mail. I know I received a number of those over
15 the years. But I just don't know. I don't
16 recall specifically how we did that.

17 Q. Okay.

18 A. So I would --

19 I guess I was speculating whether it
20 was electronic or hard copy. I don't know.

21 Q. Let's look at (e)on Document 1806.

22 And it states that FD-249, which is the

1 conviction --

2 Let me restate that.

3 So first, FD-249 is actually the
4 fingerprint card, correct?

5 A. Okay.

6 Q. And then if you see the first line:
7 Rescinds the option of holding Federal Document
8 249, suspect fingerprint card.

9 Do you see that?

10 Under --

11 A. Yes.

12 Q. -- (e).

13 Okay.

14 Next sentence: FD-249 shall be
15 submitted in accordance with this instruction,
16 and final disposition will be recorded and
17 submitted using an FBI/Department of Justice
18 Form R-84, Final Disposition Report.

19 You see that?

20 A. Yes.

21 Q. And what is your understanding of
22 who is required under --

1 First of all, that's a mandatory
2 requirement under this instruction, correct?

3 (Witness nodded.)

4 That "shall".

5 A. Yes.

6 Q. What's your understanding when you
7 were at Holloman Air Force Base when you were
8 prosecuting and convicting Devin Kelley, whose
9 responsibility it was to mail or send the
10 fingerprint card and final disposition report
11 to the FBI?

12 A. It would either be the Office of
13 Special Investigations or Security Forces.

14 Q. Okay. And what did --

15 My understanding, if I'm -- I want
16 to make sure I'm not misstating this -- is that
17 your office after Devin Kelley -- let's talk
18 about Devin Kelley -- after Devin Kelley was
19 convicted in November 2012, you were the SJA,
20 correct?

21 A. Yes.

22 Q. After Devin Kelley was convicted you

1 sent what was called a report of result of
2 trial document to the AFOSI and the 49th
3 Security Wing, correct?

4 MR. FURMAN: When you say "you", you
5 mean his office?

6 MR. ALSAFFAR: Yes. SJA.

7 THE WITNESS: Right. The SJA office
8 distributes that.

9 BY MR. ALSAFFAR:

10 Q. And after you send the report of
11 result of trial conviction, what did your
12 office do as it relates to Devin Kelley to
13 ensure that the AFOSI agents and the 49th
14 Security Forces agents actually received the
15 report of conviction of trial?

16 A. I don't recall what we would have
17 done.

18 Q. Can you tell me what you would have
19 done in the normal course of your job as SJA at
20 Holloman Air Force Base to ensure that when a
21 person was convicted at one of your trials --

22 A. Right.

1 Q. -- that the AFOSI or 49th Security

2 Forces were --

3 -- actually received the report of

4 conviction trial?

5 A. Each section has a non-commissioned
6 officer in charge and an officer in charge, and
7 then we have my Deputy overseeing things. We
8 reviewed checklists --

9 Q. Okay.

10 A. -- to make sure that different
11 things are occurring. And we typically require
12 that oversight on a checklist, so they would
13 have to lay eyes on something that was actually
14 done.

15 Q. You said that "they", your Deputies
16 or your NCOIC, were required to lay eyes on the
17 actual file to make sure the report of
18 conviction was actually received by the --

19 A. Not that it was received. That we
20 sent it.

21 Q. Oh.

22 A. I don't know that we --

1 I don't know whether we confirmed
2 that they --

3
4 Q. Okay.

5 A. -- did or not. I simply don't
6 recall.

7 Q. Okay. So you have no memory of any
8 process that was in place, any training or any
9 supervisory role in place, that you had as SJA
10 at Holloman Air Force Base when Devin Kelley
11 was convicted that would confirm that the AFOSI
12 would have received the --

13 -- and the Security Forces 49th
14 Division received the conviction report of
15 trial?

16 A. I'm not positive I understand your
17 question. I'll try to answer.

18 Q. Sure. Go ahead.

19 A. I know that we had the checklist in
20 place, and I know that we had the standards in
21 place to provide those documents, and I
22 reviewed the documents. They have the

1 distribution on them. I don't recall
2 specifically what occurred in this case to
3 determine whether they received it or not. So
4 it would have just been our standard
5 procedures --

6 Q. Uh-huh.

7 A. -- to do something. I don't recall.

8 Q. Let's talk about the checklist you
9 keep mentioning, which is important. Which
10 checklist are you referring to?

11 A. The general court martial checklist
12 that is produced by I think it's JAJM, the
13 Military Justice Branch of our Headquarters of
14 the Air Force Judge Advocate Corps.

15 Q. Does it have a form number, like
16 most government documents, or like attached to
17 it that you know of?

18 A. I don't know.

19 Q. Okay. So was this checklist only
20 specific to the SJA office? It wasn't a
21 general checklist for everybody at the base
22 that was involved in criminal investigations

1 and convictions?

2 A. That's correct. An internal
3 checklist.

4 Q. Okay. In that internal checklist --
5 And I'm not just talking about Devin
6 Kelley, but I am talking about the time period
7 that you were investigating and prosecuting
8 Devin Kelley, okay? That's the next question.

9 -- so that checklist that you're
10 applying at Holloman Air Force Base when you
11 were Staff Judge Advocate, do you have any
12 memory that the checklist included a
13 confirmation that the OSI and 49th Security
14 Wing agents actually received the report of a
15 conviction at trial?

16 A. I don't have a recollection on that.

17 Q. Okay. And the --

18 Was that checklist that you're
19 talking about, was that as part of any of the
20 documents you reviewed in preparation for this
21 case?

22 A. No.

1 Q. Okay. So going back to what we were
2 talking about in terms of confirmation, I
3 assume that weekly meetings still occurred
4 between the Staff Judge Advocate's office and
5 the agents even after Devin Kelley was
6 convicted, correct?

7 A. Yes.

8 Q. All right. Is one of the
9 operational issues that you are or were
10 concerned about as an SJA, was that the right
11 agents in the 49 h and the AFOSI were receiving
12 these conviction notices?

13 MR. FURMAN: Objection to form.

14 You can answer.

15 THE WITNESS: I'm trying to make
16 sure I understood your question.

17 MR. ALSAFFAR: Sure.

18 THE WITNESS: Was part of my concern
19 that they received those?

20 MR. ALSAFFAR: Yes.

21 THE WITNESS: Yes.

22 BY MR. ALSAFFAR:

1 Q. And why? Why was it concerning? Or
2 was it impor --

3 Was it important?

4 A. Well, it's required --

5 Q. Okay.

6 A. -- that we send those. And then
7 that's how we provide notification to all the
8 relevant agencies, and then they can take the
9 actions that they need to take.

10 Q. Um, but why is it important that
11 these convictions are actually received by the
12 Air Force agencies and reported to the FBI?

13 A. Well, it's for any number of
14 reasons: One, to provide notification. And
15 one of those would include making sure that the
16 cases are documented properly in the right --
17 -- in the right systems.

18 Q. Are you just concerned about notice
19 and proper documentation? Are there anything
20 else that's important for why you want --

21 A. Yeah.

22 Q. -- to report convicted criminals?

1 A. I didn't mean to say I was just --

2 Q. Go ahead. Answer.

3 A. Believe me, it's not just about the
4 administrative piece.

5 Q. Tell me the non-administrative --
6 Let me rephrase the question.

7 A. To make sure that the documents get
8 where they're supposed to go so people are
9 registered for their offences.

10 Q. Why is it important that you make
11 sure that the documents go where they're
12 supposed to go so that criminals are registered
13 for their offences?

14 A. So that the proper laws can be
15 enforced.

16 Q. Why is it important that the proper
17 laws are enforced for convicted criminals that
18 you were reporting back to the Air Force
19 agencies?

20 A. There's a lot of reasons.

21 Q. Give me --

22 Give me all of them.

1 A. I don't know all of them.

2 Q. Give me the ones you know of.

3 A. I'm not trying to dodge the
4 question.

5 Q. No, no. I know. I appreciate it.
6 Go ahead, tell me what you can.

7 A. Part of it is creating a record,
8 whether someone is acquitted or convicted, to
9 make sure that those cases can be referred for
10 historical purposes. And then if there are
11 ancillary consequences, additional laws like
12 the Lautenberg Amendment, then those things can
13 be enforced.

14 Q. Okay.

15 A. Is that what you're looking for?

16 Q. I'm not looking for anything. I

17 really want --

18 I just try --

19 My job is to find out all reasons
20 that I can.

21 A. It's that type of thing. And that's
22 what's at issue in this case.

1 Q. Any other reasons that you can think
2 about why it's important that criminals who
3 have been convicted by your office are actually
4 reported to the FBI?

5 A. I think that primarily it's for
6 investigative purposes, law enforcement
7 purposes, or the laws that would flow from
8 them, the ancillary consequences, like the
9 Lautenberg Amendment. If there is any
10 restrictions on voting, any restrictions on
11 possessing weapons, any restrictions on other
12 normal rights that citizens would have if they
13 had not been convicted.

14 Q. Is one of those reasons that
15 convicted criminals who meet qualifying
16 offences don't get their hands on dangerous
17 weapons?

18 A. Yes, it is.

19 Q. I'm sorry.

20 A. Yes, it is.

21 Q. Okay. And is the reason that we
22 don't want criminals who have been convicted of

1 qualifying offences to get guns, is one of the
2 reasons they've demonstrated their willingness
3 to break the law first, correct? Is that fair?

4 A. As a society, yes, that's fair.

5 Q. Okay. And as a society, as the
6 general public -- we're talking about
7 protecting the public -- do we want criminals
8 who have been convicted of qualifying offences
9 under this DODI instruction to not have access
10 to guns because we want to protect the public
11 from those people? Is that fair?

12 A. That's fair. That's one of the
13 reasons --

14 Q. Okay.

15 A. -- to the extent that this stops it.

16 Q. Okay. Right. It's one of the
17 things we can do to prevent dangerous people
18 from having guns that could increase the risk
19 of harm to the public generally, fair?

20 A. That's a fair society interest, and
21 we're interested in that as well.

22 Q. I'm sorry?

1 A. That was a fair interest of
2 society --

3 Q. Yeah.

4 A. -- and it's part of the interests
5 that we have as well.

6 Q. And the reason --

7 One of the reasons that your job is
8 important is that when you have convicted
9 somebody of a dangerous crime --

10 Would you agree that the conviction
11 of Devin Kelley was a dangerous crime?

12 A. Yes.

13 Q. You agree that the crime he
14 committed was a qualifying offence to be
15 reported, and if he goes to a federal firearms
16 licensee he should be denied access to weapons,
17 correct?

18 A. Yes, that's correct.

19 Q. Okay. And would you agree that when
20 these dangerous criminals are convicted and
21 reported, that we are --

22 Let me rephrase that.

1 Would you agree that when these
2 dangerous criminals are convicted and reported
3 and denied access to firearms, that we are
4 increasing the safety to the general public?

5 MR. FURMAN: Objection to form.

6 THE WITNESS: Yes.

7 BY MR. ALSAFFAR:

8 Q. Would you also agree that if a
9 dangerous criminal like Devin Kelley, who's
10 been convicted of a qualifying offence that
11 would deny him access to firearms, that if that
12 is not reported, those convictions are not
13 reported, and people like Devin Kelley do get
14 access to firearms, that increases the risk of
15 harm to the general public?

16 MR. FURMAN: Objection to form.

17 BY MR. ALSAFFAR:

18 Q. Do you agree with that?

19 A. Yes, it could. And I --

20 It could, yes.

21 Q. Okay.

22 A. And when you said "dangerous", the

1 offences that he committed -- assault against a
2 child, assault on his wife at the time -- those
3 are serious offences.

4 Q. Yes.

5 A. So it doesn't necessarily mean that
6 when you say a dangerous individual, those
7 don't necessarily always equate. Some people
8 that are convicted are rehabilitated and don't
9 always go forward and --

10 They don't always go forward and
11 commit additional offences, they're not always
12 dangerous to society. I do agree that the
13 offences were the type that warrant that type
14 of reporting.

15 Q. And that's a fair answer. So fair
16 to say then that, you know, we never know when
17 someone who has demonstrated, like Devin Kelley
18 did, his willingness to break the law and break
19 the law of a qualifying offence that should
20 deny him access to firearms, we never know what
21 they're going to do in the future, correct?

22 A. That's correct.

1 Q. But the reason why we have those
2 rules in place, one of the reasons to report
3 dangerous criminals like Devin Kelley to the
4 FBI, is that if we don't do that we could be
5 increasing the risk of harm to the public
6 generally, correct?

7 MR. FURMAN: Objection to form.

8 MR. ALSAFFAR: Is that fair?

9 THE WITNESS: That's a fair
10 statement. Yes.

11 BY MR. ALSAFFAR:

12 Q. Okay. Let me go back to the policy
13 a little bit, because I had a question that I
14 wanted to ask you about applicability. It's
15 No. 2 on Page 1807. It's entitled
16 Applicability. This Instruction: Applies to
17 OSD, the Military Departments, the Office of
18 the Chairman of the Joint Chiefs of Staff and
19 the Joint Staff, the Combatant Commands, the
20 Office of the Inspector General of the
21 Department of Defense, the Defense Agencies,
22 the DOD Field Activities, and all other

1 organizational entities within the Department
2 of Defense (hereinafter referred to
3 collectively as the DOD Components).

4 Do you see that?

5 A. Yes.

6 Q. I know this is kind of --

7 This may --

8 I may be revealing how stupid I am,
9 okay? So my question on this one is, this
10 seems to really address almost every Department
11 of Defense agency out there. Am I correct in
12 that? Or is --

13 Or is this a limiting --

14 A. No, it's meant to be inclusive.

15 Q. Okay. Does it include the Staff
16 Judge Advocate?

17 A. Yes. I mean, it's all components of
18 the Department of Defense.

19 Q. Okay. Including the Staff Judge
20 Advocate.

21 A. Including the Staff Judge Advocate.

22 Q. Okay. And that's probably obvious,

1 but I need to know what this stuff means, so --

2 MR. FURMAN: Jamal, just to be
3 clear, there will be a 30(b)6 witness to
4 testify to those topics.

5 MR. ALSAFFAR: Yeah.

6 MR. FURMAN: Colonel Tullos is not
7 that witness.

8 MR. ALSAFFAR: No, no. I know he's
9 not the 30(b)(6) witness.

10 (Laughing.)

11 BY MR. ALSAFFAR:

12 Q. Okay. Let me --

13 Let me generally --

14 Let me move your attention, we'll
15 skip ahead on this Document. 1815 of --

16 It's Enclosure 4, Procedures of DODI
17 instruction 5505.11. I draw your attention to
18 No. 1: For military subjects (investigated by
19 a DCIO or other DOD law enforcement
20 organization) the FD-249 --

21 A. Sorry. I'm missing --

22 Q. Oh. I apologize.

1 A. No. It's just --

2 I gotcha now.

3 Q. Yeah. It's under (b) Subsection 1.

4 A. Okay.

5 Q. Let me restate it.

6 For military subjects (investigated
7 by a DCIO or other DOD law enforcement
8 organization), the FD-249 shall be submitted
9 when an agent or law enforcement official
10 determines, following coordination with the
11 servicing SJA or legal advisor if necessary,
12 that probable cause exists to believe that the
13 person has committed an offence listed in
14 Enclosure 2. If applicable, such coordination
15 shall be documented in the investigative file.

16 Did I read that correctly?

17 A. Yes.

18 Q. Okay. And that again is a mandatory
19 instruction as well, "shall", correct?

20 A. Yes.

21 Q. Okay. And did you and your --

22 You mentioned a checklist. And did

1 your office at Holloman Air Force Base, the SJA
2 Office, while you were investigating Devin
3 Kelley and ultimately convicting him, did you
4 have an applicable checklist that ensured that
5 coordination with the OSI and 49th was
6 documenting in the investigative file?

7 A. I'm pretty sure it was not in the
8 court martial checklist. I don't know whether
9 there was a different one. I will mention that
10 when they say they shall submit the form, the
11 consultation with the SJA was only as
12 necessary.

13 Q. Right. And that's going back to
14 what you said earlier that it was fine, it's
15 okay and for the individual agents and Security
16 Forces personnel at 49th to --

17 -- if they made a probable cause
18 determination, if they made it in their own
19 minds, at that point it's mandatory for them to
20 report, and they don't need to consult with
21 your office, correct?

22 A. Correct.

1 Q. Okay.

2 A. And anything post conviction would
3 be the same thing. That decision is pretty
4 much apparent --

5 Q. Yeah.

6 A. -- and so they wouldn't have to
7 consult with us.

8 Q. Okay. But they have no discretion
9 when they receive a report of conviction to not
10 send that to the FBI, correct? If it's a
11 qualifying offence like Devin Kelley's.

12 A. Qualifying offence.

13 Q. Correct. And Devin Kelley's was,
14 right? Yeah?

15 A. That's the way I would read that.
16 Yes.

17 Q. No. 3 says, under (b) says: Within
18 15 calendar days after final disposition of
19 military judicial or nonjudicial proceedings,
20 or the approval of a request for discharge,
21 retirement, or resignation in lieu of court
22 martial, disposition information shall be

1 reported by the DCIO or other DOD law
2 enforcement organizations on the R-84, or an
3 electronic data transfer equivalent, if it has
4 not already been reported on an FD-249. Do not
5 hold the FD-249 or R-84 pending appellate
6 actions.

7 Do you see that?

8 A. I do.

9 Q. So in this situation there's no
10 requirement that the agents go through some
11 independent or individual probable cause
12 determination. Is that fair to say in this
13 fact scenario?

14 A. That's correct.

15 Q. So when, like in Devin Kelley's
16 case, when the AFOSI and 49th received the
17 final disposition report or the --

18 Let me rephrase that because that's
19 not accurate what I just said.

20 In this case, after you convicted
21 Devin Kelley of a qualifying offence, and the
22 Air Force OSI and Air Force 49th Security

1 Forces received the report of result of trial
2 of the qualifying conviction, they don't need
3 to make a probable cause determination at that
4 point. They have to send that off within
5 15 days to the FBI.

6 A. Right. And I think what this is
7 mentioning --

8 Q. Uh-huh.

9 A. -- is if I'm reading correctly, it
10 says after final disposition, not appellate
11 disposition. That final disposition would be
12 the convening authority's action, not the
13 report of result of trial. If we're talking
14 about the final disposition.

15 Q. Okay. So they can receive --
16 My understanding what you just said
17 is that the investigative agencies at Holloman,
18 the AFOSI and 49th Wing, when they re --
19 -- they can receive the notice of
20 conviction of Devin Kelley in a variety of
21 forms, not just the report of result of trial.
22 Is that --

1 A. That --

2 The report of result of trial is the
3 action that was taken at trial, guilty or not
4 guilty --

5 Q. Right.

6 A. -- and what the sentence would be.
7 The case goes for further processing.

8 Q. Okay.

9 A. And at the time the case would be
10 transcribed, provided to the defense. They
11 would have an opportunity to request clemency
12 from the convening authority.

13 Q. Okay.

14 A. After the convening authority took
15 action, that would be what we'd consider to be
16 the case would be disposed. Because at that
17 time the convening authority could have taken
18 any number of actions in clemency, including
19 not approving the findings of guilt.

20 Q. Okay.

21 A. That's not what happened in this
22 case. So I think that that occurred about 3

1 months or 2 months after trial.

2 Q. Well let's just --

3 Let's just talk about what happened
4 in this case. And we have to take a break
5 because our video is almost out.

6 Can I do one or two questions? Are
7 we good?

8 (Videographer indicated.)

9 Okay. In this case Devin Kelley was
10 convicted of a qualifying offence under the
11 mandatory instructions, and your office sent a
12 report of result of trial of that conviction
13 with the necessary description of the
14 qualifying offence to Air Force OSI and to the
15 49th Security Wing. Is that true?

16 A. I've reviewed the report of result
17 of trial. It does have Air Force OSI on the --

18 Q. Yeah.

19 A. -- distribution. I can't recall
20 whether Security Forces is on the distribution.
21 I'm believing it would be.

22 Q. Okay. And we're going to look at

1 that when we change the tape. But you sent it
2 to one of the office, investigation offices,
3 either the AFOSI or the 49th, perhaps both,
4 with the qualifying conviction listed clearly
5 on that form, correct?

6 A. Yes.

7 Q. And once they received that, they
8 have to certainly send it within 15 days,
9 according to this mandatory instruction, to the
10 FBI, correct?

11 A. I don't know whether the words
12 "final disposition" under (b)(3) --

13 Q. Uh-huh.

14 A. -- means the report of result of
15 trial or the action that a convening authority.
16 It's been a long time since I --

17 Q. That's okay. So in fact, actually
18 what you're saying, Colonel -- and I want to
19 make sure I'm accurate on this -- is that the
20 Air Force Office of Special Investigations at
21 Holloman relating to Devin Kelley's conviction
22 and the 49th Wing actually could have had a

1 mandatory obligation to report to the FBI
2 sooner than 15 days of receiving the report of
3 conviction, correct?

4 MR. FURMAN: Objection to form.

5 MR. ALSAFFAR: If they knew about it
6 by another means.

7 THE WITNESS: It's possible.

8 BY MR. ALSAFFAR:

9 Q. Okay. Either way, the both of them,
10 the Air Force OSI, Detachment 225, and 49th
11 Security Wing at Holloman did not follow this
12 mandatory instruction to report the conviction
13 to the FBI?

14 A. I don't know.

15 MR. FURMAN: Objection to form.

16 BY MR. ALSAFFAR:

17 Q. Have you seen any evidence to
18 indicate from anyone, whether your own personal
19 experience with this case or from these
20 attorneys for the United States, that the Air
21 Force actually did report Devin Kelley's
22 conviction to the FBI?

1 A. I have not seen it.

2 MR. ALSAFFAR: Okay. Let's take a
3 break to change the tape.

4 Do you want to take a 5-minute break
5 anyway? Let's just take a 5-minute break.
6 Restroom, water.

7 THE WITNESS: Do you want the
8 exhibits?

9 MR. ALSAFFAR: No, just keep it.
10 Don't take it anywhere. Keep it on the table.

11 THE VIDEOGRAPHER: Going off the
12 record. Going off the record at 15:16.

13 (Recess taken.)

14 (Deposition resumed.)

15 Going back on the record at 15:33.

16 This marks the beginning of DVD No. 2.

17 BY MR. ALSAFFAR:

18 Q. Okay. We were talking about any
19 information you had, Colonel, relating to your
20 knowledge of Devin Kelley's conviction actually
21 being reported. So I think we can --

22 -- we've addressed that and we can

1 move on. I want to hand you Exhibit No. 3,
2 which is --

3 You can leave it there, and we can
4 just stack them on. That way we don't have a
5 hard time collecting it.

6 (Exhibit 3 presented for
7 identification.)

8 Exhibit 3 is the AFOSI Manual 71-21,
9 and Bates stamped USA34. And you see at the
10 top of the page it states: "Compliance with
11 this publication is mandatory."

12 Correct?

13 A. Yes.

14 Q. Okay. And did you have occasion
15 to -- when you were at Holloman Air Force
16 Base -- to review this Air Force Manual
17 71-21 --

18 -- 121?

19 A. I don't recall specifically whether
20 I reviewed it. I may have.

21 Q. Okay. And this manual, Air Force
22 Manual, applies to the Air Force Office of

1 Special Investigations, correct?

2 A. Yes.

3 Q. And that would be AFOSI Detachment
4 225. That was an AFOSI office that this
5 mandatory manual applied to, correct?

6 A. That's correct.

7 Q. Okay. Do you see under 1.5, which
8 is on Bates stamp 42, Section 1.5 titled AFOSI
9 and JA Collaboration.

10 A. Yes.

11 Q. JA is referring to the Air Force
12 Judge Advocate, correct?

13 A. That's correct.

14 Q. That was your office at the Holloman
15 Air Force Base, correct?

16 A. Yes.

17 Q. Okay. 152, 1.5.2 states that:
18 Headquarters USAF/JA has directed the local SJA
19 to detail a support team to work with the O --
20 -- AFOSI case agent.

21 Correct?

22 A. Yes.

1 Q. So that is a --

2 That means that you're the local SJA
3 at Holloman Air Force Base in 2012, correct?

4 A. Yes.

5 Q. And what is your understanding that
6 Headquarters directed the local SJA -- you,
7 your office -- to detail a support team to work
8 with the case agents?

9 A. There's a couple of different
10 components to it. As soon as we had a case
11 break we would look to assign a trial team,
12 which would be attorney/paralegal team, maybe
13 two attorneys, and to be lead counsel on that
14 case. And sometimes that would change, but we
15 would a try to assign them early where they
16 would become familiar with the case and be able
17 to track it substantively in case it was going
18 to go --

19 -- if it looked like it was going to
20 go to a trial. A court martial.

21 Q. Okay.

22 A. We also had support through the

1 military justice section. They were not
2 prosecuting the case, but they were assisting
3 with any questions that the OSI might have, and
4 then we would track their weekly progress.
5 That would be part of the weekly meetings that
6 we had --

7 Q. Okay. What would --

8 A. -- with the OSI.

9 Q. What would be part of the weekly
10 meetings with the OSI?

11 A. We would have the Chief of Justice
12 typically, or maybe the Deputy Chief of
13 Justice, and a paralegal --

14 Q. Uh-huh.

15 A. -- as part of the OSI weekly
16 meetings, generally. I'm not saying that every
17 time it occurred, but that was the model, and
18 we tried to meet that. And we also have the
19 trial team to look at cases that might be
20 prosecuted.

21 Q. Okay. As part of these weekly
22 meetings that you just described, did the --

1 During Devin Kelley's time at
2 Holloman Air Force Base when you were the SJA,
3 did your support team from your office meet
4 with the AFOSI case agents to identify
5 potential criminal offences for investigation,
6 make recommendations to the investigative plan,
7 and compare the evidence in the case with
8 elements of proof for a given offence?

9 A. Yes. And sometimes that would occur
10 outside of those meetings as well.

11 Q. Okay.

12 A. In fact, we had on-call JAGs if a
13 case was breaking. Let's say the meeting was
14 on Monday, and a case broke on Tuesday, we
15 would have to be available to have those
16 discussions.

17 Q. Would those discussions include not
18 just standards to meet an upcoming trial that
19 you were preparing, but also investigative
20 standards of determining whether or not a
21 military member they were investigating
22 qualified to meet the probable cause standards?

1 A. They would be comprehensive
2 discussions. It wouldn't be limited to that.
3 It could certainly be part of it. But it would
4 be what offences were there, what evidence met
5 the elements of the offences, and then whether
6 those cases were substantiated or not. That
7 would include what you were talking about.

8 Q. Okay. So you understood at the time
9 you were at Holloman Air Force Base when Devin
10 Kelley was being investigated that the AFOSI
11 case agents could make a probable cause
12 determination and send his fingerprint
13 information to the FBI even prior to a
14 conviction, correct?

15 A. I don't recall specifically with
16 regard to Airman Kelley's case. And also, I
17 came late in the game on Airman Kelley's case.
18 He was already in pretrial confinement. That
19 system would have been very similar to what we
20 had in place for every case, so I don't
21 remember specifically with regard to this case.

22 Q. Okay. You said that system would be

1 consistent with what we already had in place.

2 I just want to make sure I understand what you
3 mean by that. Can you tell me what you mean by
4 that. That --

5 A. A trial team --

6 Q. Uh-huh.

7 A. -- that's assigned to a case that we
8 think is going to trial, and the weekly
9 meetings, Justice, also on call JAGs that are
10 available to consult with the agents.

11 Q. Okay.

12 A. On any of those matters. On all
13 those matters.

14 Q. Including the preconviction probable
15 cause determinations of when to submit
16 fingerprints, correct?

17 A. Potentially. If it came up.

18 Q. Okay. All right. Did you have for
19 your Judge Advocates, Military Chief Justices
20 as well, that were holding these meetings at
21 Holloman Air Force Base, did you have --

22 -- give them any specific training

1 on making sure that they would address that
2 issue of preconviction, whether the agents had
3 surmised probable cause on a qualifying
4 offence, and that if they had they were
5 reporting that to the FBI?

6 A. I don't recall any specific
7 training.

8 Q. Okay. You don't recall any specific
9 training you gave your employees on the need to
10 consult with the AFOSI agents on reporting
11 fingerprints of qualifying convictions when
12 they made their own probable cause
13 determination.

14 MR. FURMAN: Objection to form.

15 MR. ALSAFFAR: Is that fair to say?

16 THE WITNESS: Right. I don't
17 recall.

18 BY MR. ALSAFFAR:

19 Q. Okay. And as you sit here today you
20 don't have any evidence that your office was
21 training your Judge Advocates and other
22 employees under your command about submission

1 of fingerprints of the FBI for probable cause
2 determinations made preconviction?

3 A. Two different parts to that.

4 Q. Sure.

5 A. We did have training on the probable
6 cause, and I don't remember whether it was
7 specifically applied to that. It would be to
8 all circumstances where we would be making
9 probable cause determinations.

10 Q. Okay. And you had told me just a
11 few seconds ago or a minute ago that part of
12 these weekly meetings that your staff at SJA
13 would have with these case agents and AFOSI,
14 that it was supposed to be a comprehensive sort
15 of investigative meeting. You used the word
16 "comprehensive". Do you remember that?

17 A. Right. What I mean by that is it's
18 covering different aspects of the case.

19 Q. Sure.

20 A. And they were typically run by the
21 OSI agents. We were present for parts of the
22 review.

1 Q. Okay. Would it be fair to say that
2 one of the elements of a comprehensive review
3 by the Staff Judge Advocates and the Air Force
4 case agents as well, in these weekly meetings
5 one of those elements of a comprehensive
6 investigative file would be to make sure that
7 if someone --

8 -- if an agent had made a probable
9 cause determination that they were reporting
10 that fingerprint data to the FBI?

11 MR. FURMAN: Objection to form.

12 BY MR. ALSAFFAR:

13 Q. Would that be an important thing to
14 review?

15 MR. FURMAN: Same objection.

16 MR. ALSAFFAR: You can answer.

17 THE WITNESS: I don't know. I don't
18 know what was going on in that aspect. That
19 meeting that we were talking about was run
20 primarily by the OSI, and we were there to
21 advise on it. It was not one of our items that
22 our office had primary responsibility on. I

1 don't know whether the OSI had alternate
2 measures to put --

3 MR. ALSAFFAR: Sure.

4 THE WITNESS: -- in place, so I
5 don't know. I don't know the specifics on
6 those.

7 BY MR. ALSAFFAR:

8 Q. So I'm not asking you specifically
9 if you remember for this case. What I'm asking
10 you is: Do you think your -- what is your
11 thought process as the SJA at the Holloman Air
12 Force Base -- whether part of a comprehensive
13 case review at these weekly meetings with the
14 case agents should include a review of whether
15 qualifying offences that were made, probable
16 cause determinations that were made on
17 qualifying offences, were being reported to the
18 FBI pre-conviction?

19 MR. FURMAN: Objection to form.

20 THE WITNESS: Personal opinion?

21 MR. ALSAFFAR: Yeah.

22 THE WITNESS: There can be an

1 argument that could be made for that. Again, I
2 would be dependent on other mechanisms because
3 in that timeframe of those reviews I don't know
4 what the best way to run that meeting would
5 have been. It's conceivable that would have
6 been part of it. Yeah.

7 BY MR. ALSAFFAR:

8 Q. Okay. Would you have considered
9 Devin Kelley's investigation a significant
10 investigation?

11 MR. FURMAN: Objection to form.

12 THE WITNESS: Yes.

13 BY MR. ALSAFFAR:

14 Q. If an investigation is poorly
15 conducted by the Air Force, would that affect
16 the Air Force's ability to preserve good order
17 and discipline within the Air Force itself?

18 MR. FURMAN: Objection to form.

19 THE WITNESS: Possible. Depends.

20 Again, a number of factors could go into that.

21 BY MR. ALSAFFAR:

22 Q. It could not affect it, but if a --

1 -- if investigations into potential
2 crimes are not done correctly, it can sometimes
3 affect the Air Force's ability to preserve good
4 order and discipline?

5 A. It can sometimes affect it, and it's
6 important to get the --

7 (Discussion with the Court
8 Reporter.)

9 -- to get the investigations right.
10 To be thorough, to be fair.

11 Q. And one of the reasons why that's
12 important is that if the investigation is
13 poorly conducted the Air Force is unable to
14 determine and neutralize individuals like Devin
15 Kelley.

16 MR. FURMAN: Objection to form.

17 THE WITNESS: This is --

18 BY MR. ALSAFFAR:

19 Q. Let me rephrase that. I think I
20 said that incorrectly.

21 If one of the reasons why it's
22 important to not conduct a poor investigation,

1 to do it right as you said --

2 A. Uh-huh.

3 Q. -- is that if it's done poorly the
4 Air Force is unable to deter and neutralize
5 individuals like Devin Kelley.

6 MR. FURMAN: Objection to form.

7 THE WITNESS: That's a possi --

8 Yes, that's a possibility.

9 BY MR. ALSAFFAR:

10 Q. And if the Air Force or the
11 Department of Defense issues policies
12 instructions, mandatory ones concerning
13 criminal investigations, they -- the Air Force
14 or DOD -- has an obligation to train
15 Investigators and Special Agents on those
16 regulations. Do you agree to that?

17 MR. FURMAN: Objection. Form.

18 THE WITNESS: I'm not speaking on
19 behalf of the entire Air Force.

20 MR. ALSAFFAR: No, you're not.

21 THE WITNESS: We train on those
22 standards. Or we're supposed to.

1 BY MR. ALSAFFAR:

2 Q. Okay. So you agree that if the Air
3 Force or DOD issues policies like we've talked
4 about, mandatory policies concerning criminal
5 investigations, that they -- they, the Air
6 Force or DOD -- does have an obligation to
7 train Investigators and Special Agents on those
8 mandatory regulations?

9 MR. FURMAN: Objection to form.

10 MR. ALSAFFAR: Correct?

11 THE WITNESS: Yes.

12 BY MR. ALSAFFAR:

13 Q. Okay. And let's look at --
14 Do you have exhibit, the 71-121 in
15 front of you?

16 A. Yes.

17 Q. Look at Section 1.8 under Lessons
18 Learned.

19 A. Yes.

20 Q. It states: Within 30 days of the
21 conclusion of the trial, the local SJA and
22 available members of the trial team will

1 conduct a "hot wash" with AFOSI to review case
2 lessons learned.

3 Did I read that correctly?

4 A. Yes.

5 Q. Okay. Can you tell me what is your
6 understanding of the local SJA and available
7 members of the trial team will conduct a "hot
8 wash" with AFOSI to review case lessons
9 learned?

10 A. Yes. At Holloman specifically we
11 would meet with the Office of Special
12 Investigations. Typically we'd try to have the
13 people who were investigating or witnesses, as
14 well as any kind of leadership that needed to
15 be there, and there would be discussion on what
16 happened in the case, usually with regard to
17 trial or if there were investigative aspects
18 that affected the trial. That was our primary
19 issue. There may have been other aspects if we
20 saw something in a search or part of an
21 investigation, but we do that --

22 We were required to do that in every

1 case. We would try to do that often at one of
2 those staff meetings. And those would be the
3 ones sometimes I might attend when we were
4 doing a greater --

5 -- if it affected a number of people
6 from my office and their office then we would
7 have them.

8 Q. Let me give you an example in our
9 world actually, trial lawyer world. One of the
10 things I do in my office is within 30 days --
11 usually I try to do it within a week of a trial
12 that I have -- we try to meet with my trial
13 team and our staff and go over what went well,
14 what went badly, win or lose.

15 A. Right.

16 Q. Right? Does that sound like
17 something you would do according to this --

18 A. Yes.

19 Q. -- Lessons Learned?

20 But we would also --

21 Win or lose, we would also look back
22 at our case file, so our actual discovery, our

1 depositions, and see if we were missing
2 anything in that case that we could do better,
3 if we were missing important information that
4 might have helped us get a better result for
5 our clients, so that the next time we, you
6 know, in our view do the right thing to all of
7 our clients and make sure they have the best
8 representation. Does that sound like something
9 you do as a trial lawyer? Or did? Or still
10 do?

11 A. Yes.

12 Q. Okay.

13 A. That would be what you discussed was
14 primarily within our own office.

15 Q. Okay. So would --

16 Here, and according to this
17 instruction or in the manual 71-121, does not
18 wash include going back and looking at the
19 actual investigations themselves and seeing how
20 those were conducted and the evidence gathering
21 and recording and sort of operational elements
22 of a criminal investigation? Would you look at

1 that with the AFOSI case agents?

2 A. We could.

3 Q. Okay. So it could be part of it.

4 A. It could be part of it.

5 Q. Okay.

6 A. It wasn't always part of it. We
7 didn't review the entire investigation. That
8 was done through the OSI channels. But for
9 the --

10 -- to the extent that it was
11 relevant for that particular case we would go
12 back and look at the evidence. We would go
13 back. As you described it, that would be part
14 of what we would do.

15 Q. And you know, in our office we don't
16 look over everything. We look over what we
17 think were the things that are important --

18 A. Right.

19 Q. -- to make us better, but also to
20 make sure our clients get best representation.

21 So when you were doing these hot
22 washes at Holloman Air Force Base, I imagine

1 there were things that were more important to
2 review in the file and things that maybe
3 weren't as important. Is that a fair statement
4 just generally?

5 A. Generally.

6 Q. Would one thing that would be
7 important when you're doing these hot wash
8 30-day reviews of the case file with the AFOSI
9 agents, be an opportunity for you as the SJA or
10 your employees to confirm that those agents at
11 AFOSI received the conviction and reported it
12 to the FBI?

13 A. We typically wouldn't have done that
14 in those meetings because this is happening --
15 Usually we did it within the week of
16 trial or shortly after the trial we could have.
17 And that's not when we were going to --

18 The final disposition I think came
19 substantially later. But no, we didn't do that
20 that I recall.

21 Q. Okay.

22 A. I just don't remember.

1 Q. Okay. Would you agree that going
2 through a trial, putting in all the work to
3 convict somebody of a dangerous offence, which
4 I think you --

5 Would you agree that Devin Kelley's
6 was a dangerous offence he was convicted of?

7 A. Yes.

8 Q. Okay. One of the things that's
9 important when you convict somebody of a
10 dangerous offence that is a qualifying
11 conviction under the instructions and
12 regulations, is that the Air Force case agents,
13 and also the lawyers that tried the case, would
14 ensure that that conviction, qualifying
15 conviction, would actually get to the FBI to
16 prevent that person from getting access to
17 weapons. Would it be an important thing to do?

18 MR. FURMAN: Objection to form.

19 THE WITNESS: I think it's beyond
20 the scope of what we were talking about. It
21 could be important, and should be taken
22 seriously. That was not my office's primary

1 responsibility, or even we have access to that.

2 So yes, it's an important thing to do.

3 BY MR. ALSAFFAR:

4 Q. Okay. But you're not sure --

5 A. It wasn't --

6 But in the context of this, that's
7 not what the focus of these hot washes were.

8 Q. Okay. So when you did the hot wash
9 for Devin Kelley's case --

10 Well, let me actually back up. Let
11 me retract that.

12 You were still the SJA at Holloman
13 Air Force Base 30 days after Devin Kelley's
14 conviction. Is that right?

15 A. Yes.

16 Q. Do you recall specifically doing a
17 hot wash for Devin Kelley's case?

18 A. I specifically do not recall.

19 Q. Okay. When you or your agents under
20 your supervision were doing the hot wash for
21 this case, do you have any evidence that you
22 either recall or have seen that shows that your

1 office either supervised or oversaw and ensured
2 that the AFOSI case agents reported the
3 conviction you obtained on him to the FBI?

4 A. I don't recall seeing anything.

5 Q. And to this day you don't have any
6 evidence you can show me that establishes that
7 your supervision command at the SJA
8 specifically reviewed whether or not the AFOSI
9 case agents reported your conviction that you
10 obtained to the FBI?

11 A. We have the evidence that it was on
12 a distribution list. I don't have evidence
13 what happened after that.

14 Q. All right. Let me ask you another
15 question about your current --

16 -- what you did afterwards at
17 Holloman Air Force Base.

18 At Langley was part of your job
19 still -- and this would be July 2014 to 2016 --
20 were you still involved in overseeing the SJA
21 criminal investigation wing at Langley?

22 A. At when I was at Air Combat Command?

1 Q. Yes.

2 A. From 2014 to 2016, that was a --

3 It was a Headquarters role. It was
4 much farther removed from those cases, and we
5 were reviewing major cases and systems and
6 trends.

7 Q. Was the SJA --

8 When you were at Langley was the SJA
9 underneath your command? Like under your --

10 -- you were the supervisor of the
11 SJA?

12 A. I was --

13 I was under the supervision of a
14 Staff Judge Advocate at the Headquarters.

15 Q. Okay.

16 A. And I was, for a little over a year,
17 Chief of Military Justice. And we would look
18 at and review the cases for the command and
19 look at trends and analysis.

20 Q. Okay. So when you were at Langley
21 you would still have a supervisory role in
22 reviewing Air Force investigations under your

1 command?

2 A. To some extent. Yes.

3 Q. Okay. When you were at Langley do
4 you recall whether or not you had a specific
5 checklist item to ensure that when you were
6 reviewing case files at Langley that the agents
7 underneath--

8 -- underneath you were ensuring that
9 reportable qualifying convictions were being
10 sent to the FBI?

11 A. No.

12 Q. When you were at -- so this is the
13 same question -- at Quantico --

14 I think you said you were at
15 Quantico and you served in a role as SJA there
16 as well. Is that right?

17 A. Yes.

18 Q. Okay. Did you review criminal
19 investigation files while at Quantico?

20 A. Not for the SJA. I did review --
21 Not in the context that you're
22 talking about.

1 Q. Okay. Well let me go back to when
2 you were at Langley.

3 I'm sorry. When you were at
4 Vandenberg is what I meant.

5 A. When I was at Vandenberg. Okay.

6 Q. Yeah. Air Force.

7 You were the SJA from 2016 to 2019,
8 correct?

9 A. Yes.

10 Q. So you were reviewing Air Force
11 investigation files like you were at Holloman
12 Air Force Base, correct?

13 A. Generally.

14 Q. So from 2016 to 2019 do you recall
15 whether or not you had a checklist or any other
16 kind of supervisory checklist that you would
17 push down to the folks working underneath you
18 to ensure that the Air Force case agents were
19 reporting to the FBI qualifying convictions at
20 that base?

21 A. We did have checklists. And I don't
22 recall any specific guidance on OSI's reporting

1 obligations --

2 Q. Okay.

3 A. -- or the Security Forces'
4 reporting.

5 Q. And the shooting in this case, the
6 mass shooting occurred in November 2017,
7 correct?

8 A. Yes.

9 Q. So that occurred while you were at
10 Langley. You learned about it while you were
11 at --

12 A. Vandenberg.

13 Q. I'm sorry. You learned about Devin
14 Kelley's mass shooting while you were at
15 Vandenberg in California, correct?

16 A. Yes.

17 Q. When you were a Staff Judge
18 Advocate, correct?

19 A. Yes.

20 Q. Responsible for reviewing criminal
21 case files, correct?

22 A. Yes.

1 Q. And while you --

2 After you learned about the shooting
3 in Devin Kelley's case, I assume that sometime
4 shortly thereafter you also learned that the
5 agents did not properly report his conviction
6 or his fingerprints to the FBI at any time
7 during the investigation. Is that correct?

8 MR. FURMAN: Objection to form.

9 BY MR. ALSAFFAR:

10 Q. Is that your understanding?

11 A. That had been some of the
12 discussion. I did not have direct information
13 on it, but I had heard that that was at issue.

14 Q. Well, at some point that was
15 confirmed for you. Is that fair to say?

16 A. I don't know if it was established
17 as simply a fact, or it was a concern that was
18 being a possibility or likelihood.

19 Q. All right. But you know today. I
20 mean, you know, that that didn't happen. That
21 he was not --

22 A. That's my understanding.

1 Q. The conviction you got was not
2 reported, correct?

3 A. My understanding is that it was not
4 reported.

5 Q. So my question is: When you
6 obtained the understanding that the Air Force
7 never reported Devin Kelley's qualifying
8 conviction while you were a Staff Judge
9 Advocate in California, did you or did the Air
10 Force ask you to change in any way your
11 investigative case file review to place
12 emphasis on ensuring that military members who
13 are convicted of qualifying offences were
14 actually confirmed that those convictions and
15 fingerprints would be sent properly to the FBI?

16 A. I do recall that there were measures
17 that were sent out from the Air Force through
18 the JAG channels to emphasize that.

19 Q. And what measures are you talking
20 about?

21 A. I don't remember specifically what
22 those measures are.

1 Q. Well, you're currently doing weekly
2 meetings, or your staff is doing weekly
3 meetings on reporting convictions that qualify,
4 correct?

5 A. That's not part of the duties I
6 have.

7 Q. Still not part of the duties?

8 A. That's not what the office I have
9 does.

10 Q. Oh. How about staff that are under
11 your supervisory role?

12 A. We do not have cases that we review
13 for prosecution.

14 Q. Okay. Got it.

15 A. We don't own those cases.

16 Q. Okay. Okay. Are you aware since
17 this shooting whether anyone in the Air Force
18 or the Department of Defense that was --

19 -- that failed in their role to
20 report Devin Kelley's fingerprints and final
21 disposition reports, have been reprimanded in
22 any way since the shooting?

1 MR. FURMAN: Objection to form.

2 THE WITNESS: I don't have specific
3 information, so I don't know offhand.

4 BY MR. ALSAFFAR:

5 Q. Have you been told that anyone in
6 the Air Force or Department of Defense has been
7 in any way disciplined or reprimanded since
8 Devin Kelley killed 26 people in November 2017?

9 MR. FURMAN: Objection to form.

10 THE WITNESS: I have heard that
11 somebody has made decisions. I don't know
12 that. I don't have specific information, so
13 it's just general discussions.

14 I will say that because I was the
15 Staff Judge Advocate at Holloman there are many
16 discussions that I am intentionally excluded
17 from just to make sure that I don't have
18 information that's tainted or --

19 BY MR. ALSAFFAR:

20 Q. What do you mean by that? I have no
21 idea.

22 A. I know what you're saying.

1 Q. I'm sorry. I'm --

2 A. I shouldn't have just kind of
3 trailed off.

4 Q. No, that's okay.

5 A. No. I just --

6 To make sure I'm a fact witness as
7 opposed to an expert witness, I'm staying in
8 that lane and I'm not trying to --

9 I've intentionally not tried to
10 gather information, go seek out information on
11 that, on these on specifically with regard to
12 this case. It's not within my responsibility,
13 so I don't have the specific information to
14 your last question about --

15 Q. Okay.

16 A. -- whether people have been
17 reprimanded.

18 Q. So you're telling the reason why you
19 don't know whether anyone has been reprimanded
20 or disciplined in the Air Force or DOD is
21 because you've tried to create a wall from that
22 information because you view yourself as a fact

1 witness.

2 A. It's not just me.

3 Q. Okay.

4 A. That's one part. But the other part
5 is that there's Privacy Acts that apply to
6 these things, and so we do not share with
7 people who don't have a need to know what
8 happens to different individuals in the Air
9 Force administratively.

10 Q. Well, I'm asking you right now.

11 A. Okay.

12 Q. Do you know of any case agents that
13 were involved in Devin Kelley's investigation,
14 whether they've been disciplined or reprimanded
15 in any way for the failure to report Devin
16 Kelley's fingerprints and report his conviction
17 as required by the DOD and Air Force
18 regulations?

19 A. I don't know of any specific
20 discussion --

21 I'm sorry.

22 -- any specific actions that have

1 been taken.

2 Q. Okay. That's all I'm asking.

3 Have you inquired about whether
4 anyone at Holloman Air Force Base has been
5 disciplined or reprimanded for the failures to
6 submit Devin Kelley's fingerprints and
7 conviction as required by the mandatory
8 instructions?

9 A. No.

10 MR. FURMAN: Objection to form.

11 BY MR. ALSAFFAR:

12 Q. All right. Has anyone from Air
13 Force, DOD, including attorneys, told you of
14 anyone being disciplined or reprimanded out of
15 Holloman Air Force Base or command structure of
16 Holloman Air Force Base for the failure to
17 report his fingerprints and his conviction?

18 A. I can not recall specifically
19 information. I think I heard a general
20 conversation at one point, but I don't know
21 what came of it.

22 Q. Okay. Can you tell me about that

1 general conversation?

2 A. That's about all I can. I remember
3 hearing something about that, and it wasn't
4 under my responsibility, and I knew that I was
5 not supposed to be involved in those actions.

6 Q. Who were the people talking that you
7 overheard?

8 A. I don't even remember when it
9 occurred.

10 Q. Where was it?

11 A. I don't know whether it was in
12 California or out here in Virginia.

13 Q. Okay. Was it recently? Or was it
14 shortly after the events?

15 A. I don't know. Like I said, it's a
16 very general --

17 I don't remember any details
18 surrounding it.

19 Q. Was it a supervisor of yours?

20 A. I don't know.

21 Q. Okay.

22 A. It may have even been just chatter

1 or speculation.

2 Q. Okay.

3 A. I think I heard something about it.

4 Q. Okay. Okay.

5 A. It wasn't official. It wasn't
6 specific. That's --

7 So the only thing you asked: If I
8 had heard anything about it.

9 Q. No. You answering --

10 No, I appreciate it. And I'm not
11 trying --

12 I'm trying to just narrow it down
13 areas that you know about.

14 A. No. I don't recall any details
15 surrounding it, and I think it was because it
16 wasn't any kind of official position.

17 Q. Okay. So just as you sit here today
18 in this deposition you have not learned of any
19 person in Holloman Air Force Base or even
20 command structure all the way up to Regional
21 Command and higher who have been disciplined or
22 reprimanded for the failures to report Devin

1 Kelley's fingerprints or conviction to the FBI
2 as required by the mandatory instructions?

3 A. That's correct.

4 Q. Okay. Let's talk about --

5 Let's transition to another area
6 real quick.

7 You know, I didn't ask you this, and
8 this is one of those lawyers questions that I'm
9 bad for not asking, but at all times relevant
10 to your role in the Devin Kelley
11 investigation --

12 A. Uh-huh.

13 Q. -- when you were at Holloman Air
14 Force Base, you were a federal employee acting
15 within the course and scope of your federal
16 employment. Is that correct?

17 MR. FURMAN: Objection to form.

18 (Witness nodded.)

19 BY MR. ALSAFFAR:

20 Q. When you were at Holloman Air Force
21 base and involved in Devin Kelley's
22 investigation, you were a federal employee

1 acting within the course and scope of your
2 employment with the Federal Government,
3 correct?

4 MR. FURMAN: Same objection.

5 THE WITNESS: Yes.

6 MR. ALSAFFAR: What's the basis.

7 MR. FURMAN: It's a legal question.

8 MR. ALSAFFAR: No, it's not.

9 It's a factual question. I mean,
10 and he's a lawyer.

11 Okay. It's all right.

12 MR. FURMAN: He's not here as an
13 expert.

14 MR. ALSAFFAR: It doesn't matter.
15 He's here to talk about his experience and
16 understanding.

17 BY MR. ALSAFFAR:

18 Q. Okay. At no time while you were,
19 working at Holloman Air Force Base and at no
20 time while you were overseeing the Devin Kelley
21 investigation, were you an independent
22 contractor of the government as far as you

1 know. Is that correct?

2 A. Yes, that's correct.

3 Q. All right. Let's talk about the
4 next item I wanted to show you. I promised you
5 I would show you this, and so I want to make
6 sure I follow up on my promise.

7 Let me go back. Let me go back to
8 the manual. There's a question I wanted to ask
9 you. If you'll look at the manual which is
10 Bates stamped 34. What Exhibit number is that?

11 A. 3.

12 Q. 3. If you would flip real quick to
13 Page 84, which is the end of Section 4.24.4.

14 The sentence states at the very beginning --

15 I'm sorry. Are you there?

16 A. 24.4.

17 Q. Um, it's on Page 84.

18 A. I see it.

19 Q. 4. --

20 Yes. 4.24.4.

21 A. Yes.

22 Q. Use the AFOSI Investigative

1 Sufficiency Checklist (Attachment 7) or a more
2 comprehensive checklist.

3 Do you see that statement? And if
4 you will --

5 I'm sorry. Do you see that?

6 A. I do.

7 Q. If you flip to Page 200, Attachment
8 7, it's entitled AFOSI Investigative
9 Sufficiency Checklist. Do you see that?

10 A. 200?

11 Q. I'm sorry. It's 200. Yes, sir.

12 A. Okay.

13 Q. Just tell me when you get there. I
14 apologize. It's always hard to find these
15 things.

16 A. I have it.

17 Q. Okay. What is the title of
18 Attachment 7? If you would.

19 A. AFOSI Investigative Sufficiency
20 Checklist.

21 Q. Okay. Um, and this is the checklist
22 that 4.24.4 was referring to as: Use the

1 Investigative Sufficiency Checklist (Attachment
2 7) or a more comprehensive checklist.

3 Correct?

4 A. That's my assumption.

5 Q. Okay. Have you --

6 Does this checklist look familiar to
7 you in any way?

8 A. Not familiar. I may have seen it,
9 but it's an Air Force OSI --

10 Q. Okay.

11 A. -- checklist.

12 Q. What's the very first No. 1 item on
13 the checklist? Could you read it to yourself.
14 Just read it to yourself. Tell me when you're
15 done.

16 (Witness complied.)

17 A. Okay.

18 Q. The very first item on the AFOSI
19 Investigative Sufficiency Checklist is: 1.
20 Have notifications and coordinations been
21 conducted with: AFOSI specialists?

22 And (b). Legal authority?

1 Do you see that?

2 A. Yes.

3 Q. And the only legal authority on the
4 Holloman Air Force base when Devin Kelley was
5 there and you were doing the trial and
6 investigation, was that's the Staff Judge
7 Advocate's Office, correct?

8 A. That's typically.

9 Q. Okay. And would your agents, did
10 you train your agents, your --

11 Let me rephrase that.

12 When you were at Holloman Air Force
13 Base did you train and/or supervise your Staff
14 Judge Advocates to go over this checklist with
15 the agents when they had either the weekly
16 meetings or hot wash meetings after a
17 conviction?

18 A. I don't recall specific training. I
19 do recall discussion of the sufficiency
20 checklist. I don't recall specific training.

21 Q. Okay. So you recall specific
22 discussion of the checklist that's Attachment 7

1 in this manual, correct?

2 A. Yes.

3 Q. Okay. And look at No. 22, which is
4 Page 202, and 23. It states, No. 22: Did unit
5 leadership must review all FD-249s (both hard
6 copy and electronic when accomplished) and
7 R-84s for accuracy and completeness? (a) were
8 those reviews appropriately documented?

9 Do you see that?

10 A. Yes.

11 Q. Okay. What that's talking about is
12 during the sufficiency checklist as part of the
13 mandatory --

14 -- this mandatory instruction, the
15 unit leadership at Holloman Air Force Base was
16 required to review all of a military member's
17 FD-249s and R-84s for both accuracy and
18 completeness, correct?

19 A. When you say unit leadership, you're
20 talking about the Air Force OSI --

21 The Air Force OSI Unit Detachment
22 when it says unit leadership.

1 Q. Okay. And Detachment 225, correct?

2 A. Yes.

3 Q. And 23 states: Were fingerprint
4 cards submitted accurately based upon military
5 judicial and NJP proceeding considerations?

6 Do you see that?

7 A. Yes.

8 Q. Okay. And that is referring to
9 whenever there --

10 -- in part, is referring to whenever
11 there's a conviction, were those fingerprint
12 cards accurately submitted. Is that fair?

13 MR. FURMAN: Objection to form.

14 THE WITNESS: Yes.

15 BY MR. ALSAFFAR:

16 Q. Okay. Look at Page 205, which is
17 the last page of the checklist under this
18 mandatory instruction 71-121.

19 No. 53. FD-249 (Hardcopy or I2MS
20 generated)?

21 Do you see that?

22 A. I do.

1 Q. And that's the fingerprint cards,
2 correct? That's what FD-249 is?

3 A. I'm just --

4 Q. Do you know?

5 A. I am --

6 I'm not as familiar with the numbers
7 on the forms. I'm not trying to be --

8 Q. That's okay.

9 A. If you say that it's the fingerprint
10 card, that makes sense.

11 Q. Okay.

12 A. But that's what that says. Yes.

13 Q. Yeah. Okay. And I'll just assume
14 for purposes of the question that that's what
15 FD-249 is. And then also 54 states: R-84?

16 R-84 is the final disposition
17 report.

18 A. Correct.

19 Q. Correct?

20 Okay. And that has a checkbox for
21 "yes", "no", or "not applicable", correct?

22 A. Yes.

1 Q. Okay. And let's go on to the next
2 set that I wanted to --

3 -- I promised I'd show you. So give
4 me just a second.

5 I'm handing you Exhibit No. 7. Can
6 you tell me what that is, please.

7 (Exhibit 7 presented for
8 identification.)

9 A. That's the report of result of
10 trial, specifically for Airman Kelley's case.

11 Q. Okay. And what is the report of
12 result of trial?

13 A. It's after the conclusion of a court
14 martial, it lists the offences and the results
15 from each of those offences by the finder of
16 fact, which is a judge or a jury -- in this
17 case it was a jury -- and also lists the
18 sentence adjudicated.

19 Q. Okay.

20 MR. FURMAN: Jamal, did we skip 3
21 exhibits? Or am I --

22 MR. ALSAFFAR: It's 12947.

1 MR. FURMAN: Okay.

2 MR. ALSAFFAR: I'm sorry. Did
3 you --

4 What did you ask me? I'm sorry.

5 MR. FURMAN: We went to 7. I
6 thought we had done --

7 MR. ALSAFFAR: We did. We have
8 not --

9 We have --

10 I have skipped for --

11 I'll be happy to go over everything
12 if you want me to. Because I think you want me
13 to hit that 8 o'clock target.

14 No. I did intentionally skip.

15 MR. FURMAN: Okay.

16 MR. ALSAFFAR: I will probably go
17 back, but I just --

18 I promised him I'd show him this,
19 and I wanted to fulfill that promise.

20 MR. FURMAN: Okay.

21 BY MR. ALSAFFAR:

22 Q. Okay. So I've been using the phrase

1 "report of result of trial conviction on Devin
2 Kelley" throughout this deposition. And is it
3 fair to say that when I was using that phrase,
4 this document in front of you is what you were
5 thinking of as well?

6 A. Yes.

7 Q. Okay. And is it fair to say that
8 everything on 12947, all of this information on
9 the very first page of the report of result of
10 trial, is correctly entered under your
11 obligations as SJA at Holloman Air Force Base?

12 A. Yes.

13 Q. Okay. What offence? Can you tell
14 us what the offence charge was and the pleas
15 and findings of this exhibit?

16 A. Yes. The offence, the charge was
17 Article 128 of the Uniform Code of Military
18 Justice, which is assault consummated by
19 battery. There were a number of different
20 specifications, one of them was assault on a --
21 -- on his wife by pulling her hair
22 with his hands and kicking her with his foot.

1 And the second specification was
2 assault on a minor child by striking him on the
3 head with force likely to produce death or
4 grievous bodily harm. That was the aggravated
5 assault charge on a minor.

6 There were additional charges. Do
7 you want to talk about those?

8 Q. By striking the minor on the head
9 and body with a force likely to produce death
10 or grievous bodily harm, to wit, his hands.

11 Correct?

12 A. That's correct.

13 Q. Okay. So there are two convictions
14 here. Is that correct?

15 A. Yes.

16 Q. And what --

17 How did you categorize Specification
18 2 as the conviction? How is that category?

19 A. Aggravated assault on a minor.

20 Q. What is the sentence that you or
21 your staff put on this report of trial
22 conviction?

1 A. It was confinement for 12 months, a
2 bad conduct discharge, and reduction to the
3 grade of E-1.

4 Q. Okay. What else? Can you read
5 more? What else is in the --

6 A. The approved sentence to confinement
7 as a pretrial agreement would not --

8 The approved sentence of this
9 confinement would not exceed 3 years.

10 Q. Okay. And that means that this was
11 an offence that he was convicted of, Devin
12 Kelley was convicted of, that had a sentence
13 that could have been up to 3 years.

14 A. I believe it could have been up to 5
15 years.

16 Q. Okay.

17 A. But the pretrial agreement lists --

18 Q. Yeah.

19 A. -- maximum punishment would have
20 been 3 years, depending on what the jury
21 returned.

22 Q. Okay. So the actual sentence that

1 he --

2 -- sentencing that he was convicted
3 of had a potential sentence of up to 5 years?

4 A. May have been 5 years, 6 months
5 because of the two different charges.

6 Q. Okay. I've actually put 12947 on
7 the screen for you because this is really tiny
8 print. Is it easier for you to read the screen
9 version?

10 A. I can go back and forth. That's
11 fine.

12 Q. And you can go back and forth. It's
13 the same document. Um, it's actually easier
14 for me to read too.

15 A. Okay.

16 Q. How old are you?

17 How old are you?

18 A. 50.

19 Q. So I'm 45. So I'm going towards the
20 reading glasses very soon.

21 Let me ask you a couple of questions
22 about this document.

1 A. (Inaudible.)

2 Q. No, no, no. I should have said you
3 don't look 50. I'm sorry. I apologize.

4 Paul looks 50, but you don't.

5 MR. FURMAN: Objection.

6 MR. STERN: Objection. Facts not in
7 evidence.

8 (Laughing.)

9 MR. ALSAFFAR: I think that was
10 slightly argumentative. I agree with that.

11 BY MR. ALSAFFAR:

12 Q. Okay. So --

13 And I'm sorry. Let's go back to the
14 result of report of conviction here and the
15 two --

16 -- the two charges. So the charge
17 number Specification 1, violation of Article
18 128, assault by battery, that is a felony,
19 correct?

20 A. Specification 2 of Charge 1 I
21 believe is a felony.

22 Q. Okay.

1 A. Part of it is when you say "felony",
2 every state defines that differently. If
3 you're talking about an offence punishable by
4 more than 1 year, then yes.

5 Q. Okay. So that's what I'm talking
6 about. Felony is an offence punishable by more
7 than 1 year. Both these charges he pled guilty
8 to were punishable by more than 1 year?

9 MR. FURMAN: Object to form.

10 BY MR. ALSAFFAR:

11 Q. Is that your understanding?

12 A. I cannot recall whether
13 Specification 1 is independently more than a
14 year confinement. I thought consummated by
15 battery may be 6 months.

16 Q. Okay.

17 A. Yeah.

18 Q. Okay.

19 A. I may be wrong.

20 BY MR. ALSAFFAR:

21 Q. That's okay. No, that's okay. I'm
22 asking what you know. You're the prosecutor.

1 A. I do know that Specification 2 is.

2 Q. Okay. So Specification 2 is a crime
3 punishable by more than 1 year, correct?

4 A. Yes.

5 Q. And Specification 1 and 2 that Devin
6 Kelley was convicted of combined are up to, you
7 think, 5 years or 5 1/2, 6 --

8 -- 5 years and 6 months. Is that
9 your understanding?

10 A. Yes.

11 Q. Okay. Now I want to draw your
12 attention --

13 I want to draw your attention down
14 to Distribution, that section. And I pulled it
15 up just to make it because it is small. Do you
16 see that?

17 A. I see it.

18 Q. Okay. First I just need to get this
19 on the record because I don't think I
20 specifically got this. But in the box on the
21 right has Trial Counsel X'd on it, correct?

22 A. Yes.

1 Q. And it lists --

2 It says: Detailed by Owen Tullos,
3 Lieutenant Colonel U.S. Air Force, correct?

4 A. That's correct.

5 Q. That's you, correct?

6 A. Yes.

7 Q. And that also the Brett A. Johnson,
8 Captain U.S. Air Force is also listed under
9 Trial Counsel, correct?

10 A. He was the trial counsel. I
11 detailed him.

12 Q. Okay. That's kind of what I was
13 asking. What does it mean that you detailed
14 trial counsel in Devin Kelley's conviction and
15 trial?

16 A. Trial counsel is detailed by the
17 Staff Judge Advocate, and so he was the
18 responsible prosecutor on that case, and I
19 would oversee the case in general to make sure
20 that --

21 Q. You were like his second chair?

22 A. I was not in --

1 I was not in trial.

2 Q. Oh, okay.

3 A. The Staff Judge Advocate is not
4 supposed to take an adversarial role --

5 Q. Oh. Okay.

6 A. -- or a role as an advocate.

7 Q. Got it.

8 A. Just to make sure that the whole
9 system works fairly.

10 Q. Right.

11 A. That's the primary role of Staff
12 Judge Advocate is to seek justice. Prosecutors
13 do that as well, but --

14 Q. I get it. I get it. And so when it
15 says detailed by you --

16 A. Yes.

17 Q. -- it means that you picked him to
18 do this case --

19 A. That's right.

20 Q. -- and try this case.

21 Okay. And so I want you to look at
22 on the left side of this exhibit.

1 By the way, this form is called
2 AF1359, correct?

3 A. Yes.

4 Q. On the left side of this exhibit it
5 says: Distribution prescribed by convening
6 authority.

7 You see that?

8 A. Yes.

9 Q. What is convening authority?

10 A. Convening authority is a term used
11 in the military under the Uniform Code of
12 Military Justice. It's the person who is
13 authorized to stand up at trial. We don't have
14 standing courts, so each case is an independent
15 entity, and a convening authority is the person
16 who has the authority to stand up at trial. In
17 this case, a general court martial, that would
18 be the 12th Air Force Commander. My Commander
19 would give advice --

20 Q. Okay.

21 A. -- to that person.

22 Q. Um, I culled out a bigger portion of

1 the distribution list so you can see. It says:

2 Prescribed by convening authority.

3 Does that mean that --

4 Was does prescribed mean in this
5 context?

6 A. They're directing to whom we
7 distribute this.

8 Q. Okay. So what this means is that
9 there was a mandatory direction for this report
10 result of trial of Devin Kelley's conviction to
11 be sent to this distribution list as we see
12 here?

13 A. That's correct.

14 Q. Okay. If you don't mind -- I know
15 this is a bit tedious -- but I want to identify
16 who is on this distribution list --

17 A. Yes.

18 Q. -- if that's okay.

19 A. Yes.

20 Q. I believe that earlier you told me
21 in this deposition that this was the report of
22 Devin Kelley's conviction that you either

1 mailed or e-mailed to Detachment 225 and the
2 Security Forces, 49th Security Forces.

3 A. And I said I don't remember exactly
4 how they got it. It also could have been hand
5 delivered because --

6 Q. Okay.

7 A. I just don't know what form it went
8 to.

9 Q. Okay.

10 A. That was with regard to this, and
11 then also the later action with the
12 promulgating order.

13 Q. Okay.

14 A. The distribution list, is that what
15 you want me to read?

16 Q. Yes. If could you identify for me
17 what each one of those are in the distribution
18 list on Exhibit Bates stamp 12947.

19 A. Yes. Air Combat Command Commander
20 and Judge Advocate, 12th Air Force Commander
21 and Judge Advocate, 49th Wing Commander and
22 Judge Advocate, 49th Medical Group Commander,

1 49th Force Support Squadron, DPM is the
2 personnel section.

3 Q. What was the one before? What was
4 FSS? 49 FSS.

5 A. Force Support Squadron.

6 Q. Okay.

7 A. And within that Force Support
8 Squadron there's a personnel shop that records
9 all the personnel actions. So a bad conduct
10 discharge would be an example of where they
11 would be taking personnel action.

12 The 49th Comptroller Squadron, and
13 they have a financial FMFP Division. 49th
14 Security Forces Squadron Commander and SFOI,
15 which is their investigation section, Air Force
16 Legal Operations Agency, Area Defense Counsel,
17 Air Force Office of Special Investigations
18 Detachment 225, and Central Docketing Office.

19 Q. What is the AFLOAADC?

20 A. Area Defense Counsel in the Air
21 Force have a separate chain of command. They
22 don't work for anybody on the base or anybody

1 in the convening authority's chain. And they
2 work under the Air Force Legal Operations
3 Agency Headquartered in D.C.

4 (Discussion with Court Reporter.)

5 Legal Operations Agency in
6 Washington, D.C. There's a chain of command
7 that they're assigned to. It's Area Defense
8 Counsel, so it would be Defense Counsel on this
9 case.

10 Q. So this is Defense Counsel?

11 A. Yes.

12 Q. So it looks like this report of
13 Devin Kelley's conviction was distributed to
14 ten different Department of Defense agencies.
15 Is that fair to say?

16 A. I don't think they'd be called
17 agencies. They would be units.

18 Q. That's fine. I don't know if I'm
19 saying it right.

20 Okay. So fair to say that the
21 report of Devin Kelley's conviction was sent to
22 ten different Department of Defense units,

1 correct?

2 A. Yes.

3 Q. Okay. And the --

4 I believe you stated earlier that
5 this particular -- since we're talking about
6 it -- this particular document, this report of
7 conviction, you did not follow up with any of
8 these ten Department of Defense --

9 What did you call it?

10 A. Units.

11 Q. Okay. My understanding is you did
12 not follow up with any of these ten Department
13 of Defense units to confirm that they actually
14 received a conviction of report.

15 A. I don't recall whether they did or
16 not. I just don't have that information.

17 Q. Okay. Do you recall whether or not
18 anyone from these one to ten units reported
19 back to you to talk about the conviction of
20 Devin Kelley?

21 A. I do not recall whether they
22 received this document. We did consult with

1 many of them regarding the conviction.

2 Q. What do you mean you consulted with
3 many of them regarding the conviction?

4 A. 12th Air Force JAA is my higher
5 Headquarters, and we worked with them
6 throughout this process.

7 Q. Uh-huh.

8 A. The defense counsel, we coordinated
9 with them on the clemency aspect of the
10 process. Similarly, we reported later actions
11 to various agencies on here.

12 Q. Okay. When you met with those
13 agencies you just identified after Devin
14 Kelley's conviction, did you confirm whether or
15 not they reported the conviction to the FBI?

16 A. No, not that I know of. Somebody
17 else may have.

18 Q. By the way, is Specification 1 a
19 crime of domestic violence?

20 A. Yes.

21 Q. And under the Lautenberg Gun Control
22 Act Amendment, that's in and of itself required

1 to be reported to the FBI, correct?

2 A. That's correct.

3 Q. Okay. You can put that aside for
4 now. I think forever, but I'm not going --

5 I just think --

6 Okay. Let's see here. I want to go
7 back to Exhibit 5.

8 Show you Exhibit 5.

9 And I think I owe you a copy. Here
10 you go.

11 (Exhibit 5 presented for
12 identification.)

13 Exhibit 5 is Department of Defense
14 Manual 7730.47-M, Volume 1, dated December 7,
15 2010. You see under Paragraph 1(b): This
16 Volume: Prescribes the reporting data elements
17 needed to comply with Federal criminal incident
18 reporting pursuant to the note to section 534
19 of Title 28, USC (also known and hereafter
20 referred to as The Uniform Federal Crime
21 Reporting Act of 1998 --

22 -- 1988 -- sorry -- as amended

1 (Reference (d)) and the note to section 922 of
2 Title 18 USC (also known and hereafter referred
3 to as The Brady Handgun Violence Protection Act
4 of 1993, as amended, Reference (e)).

5 Did I read that correctly?

6 A. You did with one exception. It
7 would be Violence Prevention Act.

8 Q. Oh. Thank you for correcting that.

9 A. Sure.

10 Q. Thank you.

11 Boy. Whoever wrote this needs to go
12 back to legal writing school, right? All of
13 these.

14 Okay. I want you to go to Section 4
15 on the second page, which is 4945 under
16 Judicial Functions. And it reads: The two
17 areas involved in the DIBRS that fall in the
18 Judge Advocate area of responsibility are the
19 reporting requirements of Reference (m) and the
20 results of the trial reporting required by
21 Manual of Courts Martial (Reference (r)) Rule
22 of Court Martial 1101. Judicial function

1 officials shall report the results of the trial
2 and the identifying information for offenders
3 qualifying pursuant to The Brady Handgun
4 Violence Prevention Act of 1993, as amended.
5 Legal organizations with DIBRS reporting
6 responsibilities shall forward data to the
7 functional consolidating activity on a monthly
8 basis. The functional consolidating activity
9 shall forward data to DMDC on a monthly basis.

10 Did I read that correctly?

11 A. Yes.

12 Q. What is your understanding of this
13 Rule No. 4?

14 A. That we have an obligation to report
15 the results of trial and then the subsequent
16 actions that we have when the convening
17 authority takes final action, to the agencies
18 responsible for entering that in the database.

19 Q. To entering that into what?

20 A. The database.

21 Q. I'm sorry. Who's responsibi --

22 Who's responsibility is it to enter

1 it into the database according to this?

2 A. Either Security Forces or Office of
3 Special Investigations.

4 Q. Okay.

5 A. We did not have access to DIBRS.

6 Q. So the Staff Judge Advocate Office,
7 it doesn't have access to DIBRS, correct?

8 A. That's correct.

9 Q. Okay. So what's your understanding
10 here of the two areas involved in the DIBRS
11 that fall in the Judge Advocate area of
12 responsibility? Is it just reporting the
13 results of trial, as it relates to Devin
14 Kelley's case, to the AFOSI and Security
15 Forces?

16 A. That's correct.

17 Q. Okay. Um, okay. That's all I have
18 on that one.

19 I'll hand you Exhibit No. 4, and
20 then we'll be caught up on my reverse counting.
21 And let me give this to your attorneys.

22 Here you go.

1 (Exhibit 4 presented for
2 identification.)

3 Exhibit 4 is Air Force Instruction
4 51-201 Administrative --

5 -- Administration of Military
6 Justice. And Air Force Instruction 51-201 is a
7 mandatory instruction, correct?

8 A. That's correct. This is the first
9 one that's specifically with regard to JA
10 function.

11 Q. And what do you mean by that?

12 A. This is --
13 If you look at the one that falls
14 under Law.

15 Q. Uh-huh.

16 A. Many of the others were Air --
17 -- were internal to the Air Force
18 OSI, with the exception of the DOD.

19 Q. So you're saying this is specific to
20 the law side?

21 A. Uh-huh.

22 Q. The JA side.

1 Okay. If you can go to 13.22 on
2 Page 11987. And at the bottom this mandatory
3 instruction defines a crime of domestic
4 violence is an offence that has its factual
5 basis in one of the following: The use or
6 attempted use of physical force, or the
7 threatened use of a deadly weapon.

8 Do you see that?

9 A. I'm sorry. I'm trying to --

10 Q. That's okay. That's okay.

11 A. Is it 1322?

12 Q. Let me start over.

13 It's 1322. Yes, sir. And the
14 bottom sentence is what I'm referring to.

15 A. Okay. Yes, I'm following.

16 Q. Okay. Do you agree with that
17 definition of crime of domestic violence?

18 A. Yes.

19 Q. And that's what Devin Kelley's
20 Conviction No. 1 met that definition?

21 A. The use or attempted use of physical
22 force.

1 Q. Yes.

2 A. Or threatened use of a deadly
3 weapon.

4 Q. So that's a "yes"?

5 A. Yes.

6 Q. Okay. And qualifying convictions
7 include a crime of domestic violence tried by a
8 general or special court martial, correct?

9 A. Yes.

10 Q. This was a general court martial,
11 correct?

12 A. Yes.

13 Q. And when I say "this", I mean Devin
14 Kelley's court martial was a general court
15 martial. Is that right?

16 A. Yes.

17 Q. And on the front page of -- and I'm
18 showing it to you right now. It's on the
19 screen -- of the report of result of trial,
20 under Type of Court you have clearly marked
21 this as a general court martial, correct?

22 A. That's correct.

1 Q. It's hard to miss, anybody reviewing
2 this to know that this is a general court
3 martial, correct?

4 MR. FURMAN: Object to form.

5 THE WITNESS: That is correct.

6 BY MR. ALSAFFAR:

7 Q. It's also hard to miss anybody
8 knowing that this isn't a felony conviction
9 with a sentence of more than a year, correct?
10 That's plainly stated in this document. Is
11 that right?

12 MR. FURMAN: Same objection.

13 THE WITNESS: That's the purpose of
14 the document.

15 BY MR. ALSAFFAR:

16 Q. You guys did your job in clearly and
17 plainly explaining that this was a crime
18 punishable by more than a year that was
19 pursuant to a general court martial using the
20 layman's language of to describe the offence,
21 correct?

22 MR. FURMAN: Objection to form.

1 THE WITNESS: I don't know that I
2 would call it layman's language. I think
3 it's --

4 MR. ALSAFFAR: Okay.

5 THE WITNESS: -- plain language
6 would be --

7 I mean, this is legalese
8 specification. Nobody talks like that.

9 MR. ALSAFFAR: Right. I know it's
10 unfortunate we think this is normal.

11 THE WITNESS: Other than saying
12 layman's language --

13 MR. ALSAFFAR: Yeah.

14 THE WITNESS: -- the purpose of the
15 form is to layout the forum, the charges, the
16 results, and the sentence.

17 BY MR. ALSAFFAR:

18 Q. And if there was any
19 misunderstanding, anyone reading this 1-page
20 document where you described this misdeam --

21 I'm sorry.

22 -- where you described this crime of

1 domestic violence and felony conviction, you
2 have plainly or identified that this, these
3 convictions were subject to a sentence of 3
4 years or more, correct?

5 In the section under sentence.

6 A. Yes.

7 MR. FURMAN: Objection to form.

8 THE WITNESS: Sorry.

9 MR. ALSAFFAR: That's okay.

10 You can --

11 We're done with that.

12 THE WITNESS: Can I point out one
13 thing with the --

14 MR. ALSAFFAR: Absolutely.

15 THE WITNESS: Not to be nit-picky --

16 MR. ALSAFFAR: No, no. It's okay.

17 THE WITNESS: The date on this is
18 June of 2013.

19 MR. ALSAFFAR: Yep.

20 THE WITNESS: I think it's
21 substantially the same as with what we were
22 operating under before, but I can't be

1 positive.

2 MR. ALSAFFAR: No, that's fine.

3 This is the only one the U.S. Government gave
4 me.

5 THE WITNESS: That's fine. But we
6 were aware that --

7 MR. ALSAFFAR: They're going to have
8 to give us the right year.

9 THE WITNESS: The Lautenberg
10 requirements that we were looking at are very
11 similar, and that's why --

12 BY MR. ALSAFFAR:

13 Q. Right. So bottom line is the
14 Lautenberg requirements for reporting this to
15 the FBI, as you've described in your report of
16 result of trial, were met in how you described
17 it in this document, correct?

18 A. Yes.

19 Q. Okay. I'm going to show you Exhibit
20 No. 6 just so we get it on the record. It's
21 Air Force Instruction 51-201.

22

1 (Exhibit 6 presented for
2 identification.)

3 And before we talk about it, let me
4 give a copy.

5 A. It's an excerpt, and it's from 2013.

6 Q. Yes. Let me --

7 Did we just talk about this one?

8 MR. STERN: It's the same document.

9 MR. ALSAFFAR: Isn't it the same
10 document?

11 MR. STERN: Yes.

12 MR. ALSAFFAR: Yeah. Okay. We just
13 talked about that, didn't we?

14 Okay. Can I see 4 and 6. I might
15 have --

16 THE WITNESS: This is a separate --
17 You reference it in the back.

18 MR. STERN: Take a look.

19 MR. ALSAFFAR: Yeah. Yeah. Oh, I
20 see. I think I see here.

21 MR. STERN: Is that one the
22 applicable year?

1 MR. ALSAFFAR: No. You all only
2 gave me June 2013. Sneaky guys.

3 MR. STERN: Objection to that.

4 (Laughing.)

5 MR. ALSAFFAR: Yeah. You're right.
6 You're right.

7 MR. STERN: Not to be argumentative.
8 I know it was a joke.

9 MR. ALSAFFAR: Yeah, it was a joke.
10 It went on the record, it was a joke.

11 Yeah, this is fine. We just talked
12 about this.

13 So 4 and 6 are the same. I'll just
14 leave them here so we don't lose them. I
15 accidentally double marked it.

16 BY MR. ALSAFFAR:

17 Q. I want to ask you about a couple
18 things that happened after Devin Kelley's
19 conviction and while I believe you were still
20 at the Holloman Air Force Base. Tell me again
21 when you left Holloman Air Force Base.

22 A. July 2014.

1 Q. Okay. What was the last number I
2 marked? 11?

3 10. 10. Okay. And we've talked
4 about --

5 Have we talked about 10? Can you
6 look at the numbers and see. I think so. I
7 think we have. I just want to mark the next
8 exhibit.

9 So no 10 has been marked or shown to
10 the witness? Yeah? Okay.

11 Well where did I put it?

12 I just want to make sure I didn't --

13 Here it is. Sorry. Found it.

14 I want to show you Exhibit No. 9.

15 (Exhibit 9 presented for
16 identification.)

17 And before I ask you, I will give
18 you a copy, guys. Just give me a sec.

19 Exhibit No. 9 is a recorded summary
20 of an interview you gave to the Department of
21 Defense Inspector General, correct?

22 A. Yes. First time I've seen it.

1 Q. Okay. I was going to ask you,
2 have never seen this document before, right?

3 A. No.

4 Q. Was that --

5 And that was a recorded statement,
6 correct? They were recording it?

7 A. Yes.

8 Q. Okay. And it was recorded on
9 December 5th, 2017?

10 A. Approximately.

11 Q. Did you get a transcript of this at
12 all to review and look at to make sure it was
13 accurate?

14 A. I don't recall. I don't think I
15 did.

16 Q. Okay. And let me show you Exhibit
17 No. 10 since I marked it.

18 (Exhibit 10 presented for
19 identification.)

20 Exhibit No. 10 is the recorded
21 summary statement taken by the Department of
22 Defense Inspector General following the

1 shooting of Philip Countryman. Do you know who
2 that is?

3 A. I do.

4 Q. Can you tell us who that is.

5 A. He was a Captain who was in the
6 office with me for about 2 months --

7 Q. Okay.

8 A. -- and had a permanent change of
9 station (PCS) I think at the end of August.

10 Q. Do you remember what his role was in
11 the Devin Kelley investigation?

12 A. He was either the --
13 He was Chief of Adverse Actions,
14 which I was referring to as our Deputy Chief of
15 Justice --

16 Q. Uh-huh.

17 A. -- the No. 2 counsel in the Military
18 Justice section.

19 MR. ALSAFFAR: Okay. All right.
20 And I'll ask you to find this in this document
21 real quick.

22 Why don't we take a break. We've

1 been going for over an hour and I haven't given
2 you a break.

3 Is that okay? We'll transition to
4 the next step to finish up.

5 THE WITNESS: Do you want me to
6 review this on the break?

7 MR. ALSAFFAR: No. You can if you
8 want, but I don't need you to.

9 THE VIDEOGRAPHER: Going off the
10 record at 16:38. This marks the end of DVD No.
11 2.

12 (Recess taken.)

13 (Deposition resumed).

14 Going back on the record at 16:51.
15 This marks the beginning of DVD No. 3.

16 BY MR. ALSAFFAR:

17 Q. Colonel Tullos --
18 Tullos. Sorry.

19 Colonel Tullos, we had talked about
20 this earlier in the deposition so I want to
21 make sure I asked you this clearly because I'm
22 not sure I did. Remember when we were talking

1 about the disciplinary measures, if anything,
2 that you knew about or didn't know about
3 regarding what happened to those folks involved
4 in the investigation that didn't report the
5 fingerprints and didn't report the conviction.

6 Do you remember that conversation?

7 A. Yes.

8 Q. Okay. Um, I want to ask you a
9 slightly different question I didn't
10 specifically ask relating to that, okay?

11 A. Okay.

12 Q. And my question is: If you know,
13 what disciplinary measures were available in
14 the Air Force or DOD for investigators in AFOSI
15 or the 49th Security Forces Wing who failed to
16 properly collect, store or report fingerprints,
17 and failed to report qualifying convictions to
18 the FBI?

19 A. It would depend on whether they're
20 military or civilian. This is hypothetical
21 because I don't know specifically the time.

22 Q. Can I rephrase it to make it easier

1 for you?

2 A. Sure.

3 Q. What disciplinary measures for
4 military members who were --

5 -- that what was available for
6 military members who were responsible for
7 conducting AFOSI and 49th Security Forces Wing
8 investigations who failed to report, collect,
9 submit fingerprint data, and failed to submit
10 conviction for qualifying offences to the FBI?

11 MR. FURMAN: Objection to form.

12 THE WITNESS: There's a range of
13 from both administrative and punitive measures
14 that can be taken.

15 BY MR. ALSAFFAR:

16 Q. Can you tell me what those ranges
17 are.

18 A. The range is no action and oral
19 counseling, a letter of counseling that would
20 be recorded, a letter of admonition, a letter
21 of reprimand. Those would be on the
22 administrative side of disciplinary issues.

1 You go above a letter, you can also
2 include that in what's called a UIF,
3 Unfavorable Information File.

4 Q. U what?

5 A. UIF. Unfavorable Information File,
6 which is listed in a different type of record.

7 Q. Okay.

8 A. Those are on the administrative
9 side.

10 And then someone could be discharged
11 for significant misconduct administratively.
12 If they found that it was something that
13 warranted more punishment, then they could look
14 at if it's a dereliction of duty, a
15 non-judicial punishment, basically referred to
16 as an Article 15, or even court martial actions
17 depending on how serious someone --

18 That's the range of punishment for
19 any offence. You just described one potential.
20 On the civilian side it's different.

21 Q. I just want to care about the
22 military members side. Is Article 15 different

1 than court martial?

2 A. Yes.

3 Q. Okay. What is Article 15 again?

4 A. It's called non-judicial punishment.

5 Q. And what is that?

6 A. Not a court martial. Typically you
7 have to have due process, which is a trial for
8 the protection of life, liberty and property.
9 Military Commanders have the option to offer
10 punishment without going to a trial,
11 non-judicial punishment. The member can object
12 to that, and they can go to a trial.

13 Q. Kind of like a plea agreement to
14 avoid trial?

15 A. Or just you can start at that level.
16 It's not even a plea agreement. They're not
17 admitting guilt. They're just accepting a
18 forum that is less than a trial, and there's
19 less punishment that's available at that forum.

20 Q. Okay. So and I want to make sure I
21 get this accurate -- correct me if I'm wrong --
22 but the available disciplinary measures that

1 were in place at the time of the Devin Kelley
2 investigation in 2 -- let's say 2012 -- were
3 for military members, were no action, oral
4 counseling, a letter of counsel in the file,
5 letter of reprimand, a UIF which is Unfavorable
6 Information File, discharge for dereliction of
7 duty, court martial, or Article 15 non-judicial
8 punishment with no admission of guilt.

9 A. And there's also the Letter of
10 Admonishment? Admonition? LOA. Go with the
11 Letter of Admonishment.

12 Q. Okay. So in addition to that list,
13 a letter of admonishment is another --

14 A. Which is --

15 Q. -- disciplinary --
16 -- another disciplinary measure that
17 was available at the time of Devin Kelley's
18 investigation for Air Force OSI and Security
19 Forces agents responsible for investigating
20 criminal investigations like this one, correct?

21 A. Yes.

22 Q. Any other kinds that you're aware of

1 that you can recall?

2 A. No.

3 Q. Okay. And I believe, just to wrap
4 this up, is what you're saying is that based
5 on --

6 As you sit here today, you don't
7 know one way or another whether any of these
8 that you listed, disciplinary measures, have
9 actually come down on any of the responsible
10 AFOSI case agents or 49th Security Force agents
11 that were responsible for investigating Devin
12 Kelley. Is that a fair statement?

13 A. That's correct. I do not know.

14 Q. And let me ask you a similar
15 question but different. Who in the Air Force
16 and Department of Defense has authority to
17 discipline as you've identified here for
18 failure of case agents to collect, failure to
19 store, and failure to report fingerprints and
20 convictions to the FBI when they meet
21 qualifying offences?

22 A. Supervisors and Commanders at all

1 levels of the chain of command.

2 Any superior Commander or Supervisor
3 can take action as well.

4 Q. Anyone else that you can remember?

5 A. Technically, any general court
6 martial convening authority has authority to
7 discipline members in the Air Force, but that's
8 not the way it typically works. It is
9 Supervisors and Commanders in that chain of
10 command.

11 Q. Okay. Can you please identify for
12 me who the Supervisors are first that were in
13 the chain of command for the agents that were
14 responsible for the Devin Kelley investigation
15 in both AFOSI and the 49th Security Wing at
16 Holloman Air Force Base.

17 A. I don't recall their names.

18 Q. Okay. Can you recall their
19 positions?

20 A. The positions, there would be --

21 Well, I'll just start with the unit
22 Commander, the Security Forces Commander, there

1 would have been intermediate supervisors, then
2 the Mission Support Group Commander, then the
3 Wing Commander.

4 Q. Mission Support Commander?

5 A. Mission Support Group.

6 Q. Group?

7 A. Yes.

8 Q. Okay. And then you said the Wing
9 Commander?

10 A. Right. And that's on the
11 installation. And it can go all the way up to
12 the top of the Air Force if they wanted to
13 discipline.

14 Q. All the way to the Secretary of the
15 Air Force?

16 A. Yes.

17 Q. Okay. And all the way to the
18 Department of Defense, Secretary of Defense?

19 A. Don't think that that is in the
20 administrative chain. So I think it stops at
21 Secretary of the Air Force.

22 Q. And that's okay if your --

1 -- that's your recollection --

2 A. Right.

3 Q. -- how high it goes?

4 A. I'm not an expert on that.

5 Q. That's okay. That's okay. I just
6 want your understanding.

7 So my understanding is that the
8 folks that have the authority in the Air Force
9 to discipline the case agents who were
10 reviewing and responsible for Devin Kelley's
11 investigation for failure to collect, failure
12 to store, failure to report fingerprint data
13 and Devin Kelley's convictions to the FBI,
14 would include the Security Forces Unit
15 Commander, the intermediate supervisors, the
16 Mission Support Group, the Wing Commander, and
17 it could go all the way up to the Secretary of
18 the Air Force.

19 A. That's for the Security Forces
20 members.

21 Q. Okay. The Security --

22 The Secretary of the Air Force is

1 for only for the Security Forces members?

2 A. That chain of command is Security
3 Forces.

4 Q. Oh. Okay.

5 A. Air Force Office of Special
6 Investigations has a separate set of
7 supervisors.

8 Q. Let me do this to clarify --

9 Thank you. Because I want to get it
10 straight on the record. So the Air Force
11 Security Force sort of chain of command of
12 people who in the Air Force had authority to
13 discipline investigators in the military for
14 failure to collect, failure to store, failure
15 to report fingerprint data and convictions to
16 the FBI, would have been the Security Forces
17 Unit Commander, the intermediate supervisors,
18 the Mission Support Group, Wing Commander, and
19 that could go all the way up to the Secretary
20 of Air Force.

21 A. Yes.

22 Q. Okay. You're going to tell me who

1 in the AFOSI side had the same authority. Can
2 you --

3 To discipline. Can you tell me?

4 A. With the Office of Special
5 Investigations you could have the intermediate
6 supervisors, the Detachment Commander, the
7 Region Commander --

8 Q. Okay.

9 A. -- and then the Headquarters of the
10 Air Force Office of Special Investigations
11 Commander --

12 Q. Okay.

13 A. -- as well as Secretary of the Air
14 Force.

15 Q. Okay. So the people who had --
16 -- in the Air Force who had the
17 authority to discipline military investigators
18 involved in Devin Kelley's case for failure to
19 collect, failure to store, and failure to
20 report his fingerprint data and his convictions
21 to the FBI, included -- and this is for the
22 AFOSI side -- included the intermediate

1 supervisors, Detachment Commanders, Region
2 Commanders, Headquarters AFOSI Commander, and
3 the Secretary of Air Force. Is that right?

4 A. Yes.

5 Q. Okay. And the region that was
6 over--

7 --that controlled and was overseeing
8 and supervising Holloman Air Force Base at the
9 time that Devin Kelley was being investigated
10 and ultimately convicted, was Region 2. Is
11 that correct?

12 A. That's correct.

13 Q. And Region 2 is based where?

14 A. Air Combat Command co-located
15 Langley Air Force Base.

16 Q. Okay. Did your office have any
17 interaction with the Region 2 Commander
18 supervisors?

19 A. No.

20 Q. And when I say "your office", at the
21 time of the Devin Kelley investigation and
22 conviction you didn't have any interaction at

1 SJA with the Region 2 Commanders, correct?

2 A. That's correct.

3 (Discussion off the record.)

4 MR. ALSAFFAR: Well, just tell me
5 when you get around to it.

6 No, I appreciate it.

7 Let me go on to --

8 So let me --

9 Before I --

10 I want to ask you about that
11 document we're uploading. So let me just go to
12 this real quick. I'm going to --

13 Hold on just a second.

14 Can I mark this? I didn't mark
15 this. I'm sorry.

16 (Exhibit 11 marked for
17 identification.)

18 Are you okay? Do you need any water
19 or anything?

20 THE WITNESS: I'm good.

21 BY MR. ALSAFFAR:

22 Q. Commander Tullos, I'm handing you

1 Deposition Exhibit No. 11. And I don't know if
2 you've seen this before, but it's a letter from
3 the U.S. Department of Justice, Bureau of
4 Alcohol, Tobacco, Firearms and Explosives.

5 Do you see that?

6 A. Do you know the date?

7 Q. I don't know. They don't have a --

8 A. It's referencing 2018.

9 Q. It is. It's probably after April --

10 It's after April 2018.

11 We need to tell ATF to put dates on
12 their letters.

13 Aren't they just across the street?

14 MR. STERN: Get right on that.

15 (Laughing.)

16 MR. ALSAFFAR: Right. Like five

17 armed guards out front. Good luck.

18 BY MR. ALSAFFAR:

19 Q. Okay. This is, um, a document from
20 the DOJ by Barry Orlow, Associate Chief
21 Counsel, Law and Policy Division. I want to
22 kind of refer your attention actually to Page

1 -- even it's numbering is interesting -- Page 2
2 of this document.

3 MR. FURMAN: Jamal, is there a Bates
4 stamp?

5 MR. ALSAFFAR: Yeah. I don't see a
6 Bates stamp on this, but I know this is --

7 This was produced, but --

8 MR. STERN: This is our production,
9 right?

10 MR. ALSAFFAR: It should be, yeah.
11 It should be. I don't know why there's not a
12 Bates stamp number on it, but we can certainly
13 go back and look over it. Yeah. Yeah. But
14 there is not. There is not. I don't --

15 I don't necessarily know why
16 actually. It's strange.

17 BY MR. ALSAFFAR:

18 Q. Okay. On the bottom of Page 2,
19 you --

20 Do you know what the Holloman Air
21 Force Base High Risk For Violence Response Team
22 is?

1 A. Yes.

2 Q. And it's HRVRT is the acronym,
3 correct?

4 A. Yes.

5 Q. Can you tell me what the Holloman
6 Air Force Base High Risk For Violence Response
7 Team is as it existed at the time of Devin
8 Kelley's investigation and conviction?

9 A. It's a team that would be convened
10 when deemed appropriate based on a certain fact
11 and circumstances. It would be composed of
12 investigators, Security Forces and/or Office of
13 Special Investigations, medical personnel,
14 usually mental health, possibly family advocacy
15 legal, so interdisciplinary team that would try
16 to assess when a situation would be a potential
17 for violence to occur.

18 Q. Okay. Um, and in this letter the
19 ATF counsel states that in May 14th-15th,
20 2012 -- so this is the same Page 2 I was
21 referring to you to -- said that: An HRVRT was
22 convened to discuss Kelley's mental health

1 concerns. Kelley's Squadron leadership and his
2 mental health providers feel that he is a major
3 threat to commit an act of violence and is
4 currently institutionalized for mental and
5 emotional instability.

6 Did I read that correctly?

7 A. I'm sorry. I'm not tracking where
8 you are.

9 Q. That's okay. It's Page 2 on the
10 bottom, not Page 2. For some reason ATF
11 doesn't number its first page. It's the third
12 page, but it's labeled Page 2.

13 There's a lot to discuss with the
14 ATF counsel, I think, on how to do a letter.

15 But looking on page numbered 2 of
16 the ATF counsel's letter to the Department of
17 Justice.

18 A. I've read that. Yes.

19 Q. Perfect. Okay. So did I read that
20 correctly?

21 A. Yes.

22 Q. Okay. And my question for you

1 first -- I have two areas to ask you about --
2 first, do you remember this Holloman Air Force
3 Base High Risk For Violence Response Team that
4 was put together to discuss Devin Kelley
5 specifically?

6 A. It occurred before I arrived.

7 Q. Okay. So this was 2 months --
8 -- 2 months before you arrived?

9 A. Right. I was aware of it after the
10 fact.

11 Q. Okay. And how did you become aware
12 of this High Risk For Violence Response Team
13 that was put together at Holloman Air Force
14 Base for Devin Kelley?

15 A. As part of my review and discussion
16 of the case I became aware of it.

17 Q. Okay. So as part of your duties as
18 an SJA at Holloman Air Force Base and a
19 supervisor of Judge Advocates at the base, you
20 were aware that a High Risk For Violence
21 Response Team was put together to specifically
22 assess Devin Kelley's risk factors, correct?

1 A. Yes.

2 Q. And specifically, the High Risk For
3 Violence Response Team was put together for
4 Devin Kelley in May 2012 by the Air Force,
5 correct?

6 A. Yes.

7 Q. And the reason why that the High
8 Risk For Violence Response Team was put
9 together by the Air Force in May 2012 was
10 because Devin Kelley was a major threat to
11 commit an act of violence.

12 MR. FURMAN: Objection to form.

13 MR. ALSAFFAR: Correct?

14 THE WITNESS: Yes.

15 BY MR. ALSAFFAR:

16 Q. And you agreed with that?

17 A. It was a potential. They were
18 assessing that. And I think that's what their
19 conclusion was. Yes.

20 Q. Actually they said he is a major
21 threat to commit an act of violence, correct.

22 A. It was convened to determine that,

1 and that was their determination.

2 Q. Fair. Fair. So the High Risk
3 Violence Response Team at Holloman Air Force
4 Base in May 2012 was convened to decide whether
5 Devin Kelley was a major threat for violence,
6 correct?

7 A. That's correct.

8 Q. And they ended up determining that
9 in fact Devin Kelley was a high risk major
10 threat to commit an act of violence, correct?

11 A. Yes.

12 Q. And you didn't disagree with that
13 when you were part of the review of that
14 decision, were you?

15 A. No, I don't disagree with it.

16 Q. Okay. And on Page No. 3, the
17 paragraph titled June 8th, 2012, this document
18 states: Kelley's Commander orders him into
19 pre-trial confinement at 49 SFS Building, 35.
20 Confinement was deemed necessary because it was
21 foreseeable he would flee again and engage in
22 serious criminal misconduct.

1 Do you see that?

2 A. Yes.

3 Q. And then a couple lines down it
4 states: There is evidence in the record that
5 Kelly attempted to purchase a handgun before
6 being placed into pretrial confinement (June 7,
7 2002 (sic.) entry.)

8 Do see that?

9 A. Yes.

10 Q. So two questions there. Do you
11 agree that confinement for Devin Kelley in
12 June 2012 was necessary because he was a
13 foreseeable risk to engage in serious criminal
14 misconduct?

15 MR. FURMAN: Objection to form.

16 THE WITNESS: Yes.

17 MR. ALSAFFAR: I'm sorry. Your
18 answer was?

19 THE WITNESS: Yes.

20 BY MR. ALSAFFAR:

21 Q. And do you agree that there was
22 evidence in the record that Kelley attempted to

1 purchase a handgun in June 2012 before being
2 placed into pre-trial confinement?

3 A. Yes.

4 Q. After the Air Force was made aware
5 that Devin Kelley tried to purchase a handgun
6 in June 2012, when you held your review
7 meetings, including the high risk for violence
8 review meetings, did you all discuss: Hey,
9 have we --

10 Did we report his arrest and
11 confinement, of fingerprints and arrest and
12 confinement to the FBI?

13 Did that ever come up when you found
14 it he was trying to purchase weapons?

15 A. I was not part of any of the High
16 Risk For Violence meetings. They concluded
17 when he was in pretrial confinement as far as I
18 know. I don't recall anything after that. So
19 no, I don't recall any conversations along
20 those lines.

21 Q. All right. And by the time that he
22 was in pre-trial confinement, there was no

1 question that probable cause existed that would
2 have triggered the reporting requirements and
3 collection requirements of fingerprints and to
4 the FBI, correct?

5 A. It would be some speculation because
6 I don't know all the evidence that they had.
7 It would be safe to assume that they had
8 evidence along those lines.

9 Q. Okay.

10 A. I don't know specifically because I
11 don't remember what evidence they had before
12 them.

13 Q. When a High Risk For Violence Team
14 concludes that a military member is a major
15 threat to commit an act of violence, and it is
16 foreseeable that that person -- Devin Kelley --
17 would engage in serious criminal misconduct and
18 is placed --

19 -- and has attempted to purchase a
20 firearm, and is placed in confinement before
21 his trial, that that rises to your definition
22 of probable cause to report his fingerprints,

1 collect them and submit them to the FBI. Is
2 that fair?

3 MR. FURMAN: Object to form.

4 THE WITNESS: I think that would be
5 fair. Yes.

6 MR. ALSAFFAR: Okay. Okay. That's
7 all I have on that.

8 (Exhibit 12 marked for
9 identification.)

10 BY MR. ALSAFFAR:

11 Q. This is, um, --

12 I'm showing you --

13 This has not been produced by the
14 defendant. This came up here. This is answers
15 by the Secretary of the Air Force, Heather
16 Wilson, submitted in response to Senator
17 Hirono's questions on December 13th, 2017,
18 after the Devin Kelley shooting and after the
19 investigation, initial investigation at least,
20 by the DOD Inspector General, okay? That's
21 what I'm showing you.

22 Let me see if I can make that bigger

1 for you.

2 A. It's fine.

3 Q. Okay. The first question that she
4 is asked that she responded to in writing, the
5 first question was: At the hearing you stated
6 the criminal record for Devin Kelley the
7 shooter in the Sutherland Springs, Texas mass
8 shooting should have been reported to the
9 National Institute of Criminal Background Check
10 System (NICS), but it was not. Where was the
11 breakdown in the reporting process that led to
12 the failure to report Kelley's criminal history
13 data?

14 Answer: We failed --

15 This is by Secretary Wilson.

16 Answer: We failed to submit criminal history
17 data to the FBI when probable cause existed in
18 the Air Force Office of Special Investigations
19 and Air Force Security Forces investigations on
20 Kelley after Kelley's court martial conviction
21 and also upon his post-trial confinement at
22 Holloman Air Force Base.

1 Did I read that correctly?

2 A. Yes.

3 Q. Do you agree with Secretary Wilson's
4 statement here?

5 MR. FURMAN: Objection to form.

6 THE WITNESS: I don't have all the
7 facts. But assuming that those things
8 occurred, then yes, those are the triggers to
9 report.

10 BY MR. ALSAFFAR:

11 Q. And so do you agree with her
12 assessment or not?

13 MR. FURMAN: Objection to form.

14 MR. ALSAFFAR: You can answer.

15 THE WITNESS: Her assessment is
16 based on more information than I have. I don't
17 disagree with her assessment. My understanding
18 is if he was not reported when probable cause
19 existed we would have an obligation to submit
20 that information, as well as upon the
21 conviction and post-trial confinement. So I
22 think she's accurate in stating that's when we

1 would report those. Again, I don't have all
2 the underlying facts to know whether it
3 actually occurred or didn't occur. Those --

4 Q. I think I understand.

5 A. -- conditions precedent --

6 Q. You --

7 Based on the information that you
8 have, you don't disagree with Secretary
9 Wilson's statement that: We, the Air Force,
10 failed to submit criminal history data to the
11 FBI when probable cause existed in the AFOSI
12 and AFSF investigations on Kelley after
13 Kelley's court martial conviction and also upon
14 post-trial confinement at Holloman Air Force
15 Base.

16 A. Right. I don't have specific
17 information. I don't disagree with the
18 Secretary.

19 Q. Okay. Could you please read to
20 yourself Secretary Wilson's answer to question
21 1(b). The question is: What steps have been
22 taken to address specifically that breakdown in

1 the reporting process?

2 Can you please read that answer to
3 yourself and let me know when you're finished.

4 (Witness complied.)

5 Do you agree with that answer by
6 Secretary Wilson?

7 MR. FURMAN: Objection to form.

8 THE WITNESS: Yes.

9 BY MR. ALSAFFAR:

10 Q. Let me make sure to correct the
11 objection. Do you agree with Secretary
12 Wilson's answer to question 1(b)?

13 MR. FURMAN: Same objection.

14 THE WITNESS: Yes.

15 BY MR. ALSAFFAR:

16 Q. And can you tell me if you have
17 personally seen any of these supervisory
18 training and review processes that Air Force --
19 -- that Secretary Air Force Wilson
20 testified to in December 13, 2017? Have you
21 seen these personally, have you seen these
22 implemented in the various Air Force stations

1 that you've been at since the mass shooting in
2 this case?

3 A. I can't recall whether what I saw
4 was in guidance that was being developed, or
5 that it was actually implemented. I believe
6 AFI 51-201 --

7 -- Air Force Instruction AFI 51-201
8 has been updated. I believe other guidance may
9 have been updated as well.

10 Q. Okay. Have you seen people actually
11 correcting and following those updates as on
12 the ground as Secretary Wilson has identified
13 in this answer?

14 A. I have not been at the bases to see
15 Detachments and Wing level JAG Offices do that
16 specifically. I've been at higher
17 Headquarters. I have seen higher Headquarters
18 engage.

19 Q. So, but one of the things Secretary
20 Wilson is talking about is more and better
21 engagement was necessary from the higher levels
22 of supervision at the time of the shooting. Is

1 that a fair statement?

2 A. Yes.

3 Q. And there were failures at the
4 higher level of supervision command that in
5 part allowed this to happen.

6 MR. FURMAN: Objection.

7 MR. ALSAFFAR: The failure to report
8 his fingerprints and the failure to report his
9 conviction to the FBI. Is that fair to say?

10 MR. FURMAN: Objection to form.

11 THE WITNESS: That specific
12 information, I would assume that's correct, but
13 I don't have that specific information.

14 BY MR. ALSAFFAR:

15 Q. So have you seen anything at the
16 higher levels of supervision in command at the
17 stations you've been at since the mass shooting
18 that are reflecting that those higher levels of
19 supervisory and training command are actually
20 implementing what Secretary Wilson is talking
21 about in answer 1(b)?

22 A. Yes.

1 Q. Can you tell me what those are.

2 A. There have been updates to
3 instructions.

4 Q. Okay.

5 A. There have been updates to
6 inspecting checklists on threat --

7 Q. Okay.

8 A. -- the inspection checklists. There
9 has been a task force that was instituted, and
10 that has been normalized into what's called a
11 cell. I think that there has been
12 congressional action to fund that and man that.

13 Q. Okay. Anything else?

14 A. Just an emphasis. The emphasis
15 that's referred to on training and on
16 execution.

17 Q. Do you know specifically the levels
18 of command above you in terms of their titles
19 that have taken more care on a supervisory and
20 training level to push down these new
21 requirements to the boots on the ground folks
22 who have to do these investigations and

1 reporting?

2 A. All echelons all the way to the
3 Secretary.

4 Q. Say that a little slower and louder.

5 A. All echelons.

6 Q. Can you tell me what echelons.

7 A. Sure. Headquarters of the Air Force
8 JAG, the one I'm familiar with, is engaged with
9 it, and Headquarters of the Air Force Office of
10 Special Investigations is engaged, as well as
11 the Inspector General.

12 Q. Okay.

13 A. And I believe the Secretary has also
14 issued guidance.

15 Q. The Secretary of the Air Force?

16 A. Right. And even the Department of
17 Defense has updated their .11 instruction. The
18 505. The one that we referred to earlier.

19 Q. You mentioned the task force that
20 was funded and done by the Air Force. Are you
21 talking about the task force that collected
22 every single unreported conviction that met the

1 instruction standards and unreported
2 fingerprint reporting that met the reporting
3 standards of the Department of Defense and Air
4 Force instructions?

5 A. To my knowledge, they reviewed all
6 the cases to make sure that they were properly
7 inputted. I don't know if it was down to the
8 criteria that you mentioned.

9 Q. Okay.

10 A. Certainly those were the things that
11 they were looking for, whether probable cause
12 existed, whether they were qualifying offences,
13 and whether they were properly indexed.

14 Q. And how many did the Air Force miss?

15 A. I don't know.

16 Q. Have you looked at that task force?
17 Have you looked at the task force conclusions
18 and results that the Air Force instituted?

19 A. No.

20 MR. FURMAN: Objection to form.

21 BY MR. ALSAFFAR:

22 Q. No? Okay?

1 So you don't know either way what's
2 happened to the 6900 military members convicted
3 and/or who qualified for fingerprint reporting
4 requirements in terms of whether those were
5 corrected, all of them, and reported to the FBI
6 so they couldn't buy weapons?

7 MR. FURMAN: Objection.
8 Argumentative.

9 THE WITNESS: I don't know about
10 6900. I don't have that specific information.
11 From what I understand, they have reviewed all
12 of the records of convictions and possible
13 qualifying records, and tried to make sure that
14 they were properly indexed.

15 BY MR. ALSAFFAR:

16 Q. When you say "properly indexed", you
17 mean put into the system, the FBI NICS
18 background check system, correct?

19 A. Yes.

20 Q. I'm showing you a press release from
21 the Air Force that was issued on November 5th,
22 2018. It should be on your screen here in just

1 a second. Apparently --

2 MR. STERN: Jamal, you don't have a
3 hard copy for us?

4 MR. ALSAFFAR: Yeah. I do actually.
5 Let me give it to you.

6 MR. STERN: You're not marking this
7 as an exhibit number.

8 MR. ALSAFFAR: No. I don't need to.
9 It's okay.

10 BY MR. ALSAFFAR:

11 Q. Okay. If you look at this press
12 release from the Air Force, and the paragraph
13 beginning, third paragraph down: During Phase
14 1 the indexing task force reviewed 47,129 files
15 and identified 6978 files with no OSI criminal
16 history record, 5607 were corrected by
17 establishing the criminal history record for
18 the subject through submitting fingerprints.
19 The remaining 1371 files are awaiting
20 correction based on fingerprint availability
21 from military entrance processing. This is an
22 ongoing process and the figures change daily.

1 Do you see that?

2 A. Yes.

3 Q. So what that means first of all,
4 there were 6978 reportable people to the FBI
5 that were not entered in the FBI background
6 check system, correct?

7 MR. FURMAN: Objection. Form.

8 THE WITNESS: Yes.

9 BY MR. ALSAFFAR:

10 Q. And that they've only been able to
11 discover and put into the record, FBI record,
12 5607, correct?

13 A. Yes.

14 Q. And at least as of the date of this
15 press release from the Air Force we still have
16 1371 qualifying people who should be denied
17 access to firearms who are still roaming out
18 there --

19 MR. FURMAN: Objection to form.

20 MR. ALSAFFAR: -- as of the date of
21 this release.

22 MR. FURMAN: Same objection.

1 MR. ALSAFFAR: Correct?

2 THE WITNESS: Let me read further.

3 MR. ALSAFFAR: Sure.

4 THE WITNESS: I don't know whether
5 this is comprehensive. There's different types
6 of indexing that occurs. Some of the indexing
7 does not trigger a National Criminal Instant
8 Background Check System entry such that they
9 would be denied the right to --

10 -- sorry.

11 -- reflect that they could not
12 possess or purchase firearms. Some of the
13 indexing that they do only goes to whether
14 there was probable cause to determine that they
15 were either apprehended or detained for an
16 offence. They would have an arrest record, but
17 not necessarily a prohibition on possessing and
18 purchasing a weapon. And I don't know which
19 this is referring to.

20 BY MR. ALSAFFAR:

21 Q. So if you look at the first
22 paragraph, it states: During Phase 1 AFOSI

1 personnel reviewed and indexed subjects with
2 qualifying offences in all investigative files
3 from 2002 to 2017.

4 A. Right.

5 Q. Do you see that?

6 Reviewers determined if probable
7 cause existed to index subjects in the III
8 database. If probable cause existed and there
9 was no criminal history record, the reviewer
10 indexed the subject with the correct changes
11 and dispositions. If fingerprints were
12 available when a criminal history record
13 contained erroneous information, the reviewer
14 submitted changes to the Criminal Justice
15 Information Services (CJIS) to ensure the
16 record reflected the correct information.

17 Do you see that?

18 A. Yes.

19 Q. Is that what you were explaining to
20 me just now?

21 A. That there's a distinction. So you
22 may have a fingerprint record of an arrest or

1 of some type of investigation, but that may not
2 make the criteria of 18 USC 922 such that they
3 would have appropriate prohibition on
4 firearms --

5 Q. Okay.

6 A. -- or ammunition.

7 Q. So I think what I'm understanding
8 you saying is that when this remaining 1371
9 military folks that they still don't know the
10 answer to, they --

11 -- these folks are still potentially
12 allowed to purchase firearms when they should
13 be barred.

14 MR. FURMAN: Objection to form.

15 THE WITNESS: I don't know which
16 category they would fall into, but it's a
17 potential.

18 BY MR. ALSAFFAR:

19 Q. It's a potential, right?

20 A. I don't have the facts to know which
21 category they fall into.

22 MR. ALSAFFAR: Okay. That's fine.

1 Okay. Let's take a quick break. I
2 think I'm done or close to it.

3 MR. FURMAN: Okay.

4 MR. ALSAFFAR: And let's just give
5 you 5 minutes and then we'll come back at it.

6 THE VIDEOGRAPHER: Going off the
7 record at 17:27.

8 (Recess taken.)

9 (Deposition resumed.)

10 Going back on the record at 17:32.

11 MR. ALSAFFAR: Colonel Tullos, thank
12 you very much for your time and patience with
13 me. I don't have any questions. I pass the
14 witness.

15

16 EXAMINATION

17 BY MR. FURMAN:

18 Q. Colonel Tullos, earlier Mr. Alsaffar
19 talked about a continuity book. What's the
20 purpose of that book?

21 A. It's a handoff between people that
22 are taking over and the person leaving --

1 (Discussion with the Court

2 Reporter.)

3 The purpose of the continuity book
4 would be to transition from one person in a
5 position to the next person to try to spin that
6 person up on what they need to do to get
7 started and some of the basics of that position
8 on current issues. Current references.

9 Q. And the material that's contained,
10 would that be based on existing policy?

11 A. Sometimes they're ad hoc. There's
12 not a standard for those. So each position
13 needs --

14 (Discussion with the Court
15 Reporter.)

16 MR. ALSAFFAR: Do you want to
17 switch?

18 MR. FURMAN: Yeah. I'd ask --
19 Do you mind?

20 MR. ALSAFFAR: We won't go off the
21 record, just walk over.

22 THE VIDEOGRAPHER: Going off the

1 record at 17:33.

2 (Recess taken.)

3 (Deposition resumed.)

4 Going back on the record at 17:35.

5 BY MR. FURMAN:

6 Q. We were talking about the continuity
7 books. Is there anything at all that's
8 mandatory in these continuity books?

9 A. No. It's not prescribed by any
10 regulations.

11 Q. And is the incoming Commander or
12 incoming staff for whom the book is for, are
13 they required to follow anything in those
14 books?

15 A. If it's a regulation then they're
16 required to follow it. But if it's just
17 practices and procedures they can shift things
18 or modify it to suit them.

19 Q. So the only thing that would be
20 mandatory in those books would be regulations
21 that were mandatory?

22 A. The law or regulations.

1 Q. Earlier we talked about probable
2 cause, and I believe you said that you trained
3 your staff on probable cause. Is that right?

4 A. Right. Yes.

5 Q. And it was your office's role to
6 consult with AFOSI Security Forces on probable
7 cause issues?

8 A. Yes.

9 Q. Earlier you were talking a little
10 bit about, I believe the differences between
11 probable cause to search for evidence versus
12 probable cause to --

13 -- that a crime had been committed.

14 Do you recall that?

15 A. Yes.

16 Q. And to make sure the record is
17 clear, could you explain the difference between
18 the two.

19 A. Again, the legal principal is the
20 same as far as it's a standard of evidence less
21 than a probable --

22 -- a preponderance of evidence. It

1 has to be based on reasonable grounds to
2 believe something, and that's where the
3 application can be different. If it is to
4 search for either a place or for specific
5 evidence, you have to have probable cause to
6 believe that a crime occurred and that evidence
7 of the crime is in the place that is prescribed
8 in your authorization or warrant. If it's a
9 probable cause determination to determine
10 whether someone has committed an offence, then
11 you look at all the evidence there and they
12 determine that an offence was committed and
13 this person committed it based on the state of
14 the evidence. Also factored into that is the
15 investigator's training and judgment. And so
16 in cases there is not a set time where you must
17 make a probable cause determination. It
18 depends on the state of the evidence. If you
19 know that more evidence is pending that may or
20 may not contradict or corroborate or at least
21 be probative of that decision, then you can
22 wait to make that determination. And then we

1 have probable cause standards within Article 32
2 procedure to see if we meet that threshold to
3 go forward with a case to a general court
4 martial.

5 Q. Focusing on probable cause, search
6 for evidence.

7 A. Yes.

8 Q. Is it possible to have probable
9 cause to search for evidence without having
10 probable cause that a specific person committed
11 that offence?

12 A. It's possible, yes. Part of it is
13 an offense may be committed, you may not have
14 identified exactly who has done it, but you can
15 find evidence that the crime itself has been
16 committed to later develop who did it.

17 Probably likely in this case.

18 Q. And you talked --

19 We talked earlier about your role as
20 the JAG at Holloman. And in that office how
21 many employees did you have working for you?

22 A. Somewhere around 23, give or take.

1 It would fluctuate between 20 and 25, in that
2 range.

3 Q. And what types of employees were
4 those?

5 A. We had officers that were our Judge
6 Advocates, and then two civilian attorneys as
7 well. Then we had paralegals who were military
8 paralegals. We also had three positions --

9 -- two or three positions that were
10 civilian, either paralegals or legal assistant
11 typo positions. We had reservists that were
12 not full-time active duty. Three of those.

13 Q. And am I correct that as the JAG
14 you're responsible basically for all legal
15 matters on the base?

16 A. Yes.

17 Q. And what types of law fell under
18 that umbrella?

19 A. We had the Military Justice, which
20 would be the criminal offences and then minor
21 disciplinary actions that fell below that, so
22 good order and discipline aspects. And then we

1 had a general law section that included
2 everything from employment law, federal
3 employment law, environmental law, contracting,
4 other types of federal administrative law,
5 government ethics. We had an international law
6 section. We had 600 Germans on base that were
7 a flying squadron. We had operations law in
8 different forms. We also perform legal
9 assistance for individuals.

10 Q. Is it fair to say that in that
11 office you had to deal with many different
12 types of law?

13 A. Many. Yes. In fact, when I said
14 legal assistance, there's probably five or six
15 different types of law that are with that.

16 Q. And did you have to deal with many
17 different types of Air Force regulations?

18 A. Yes.

19 Q. Do you know how many Air Force
20 regulations there are?

21 A. No.

22 Q. Are there a lot?

1 A. Yes.

2 Q. Over 100?

3 A. Yes.

4 Q. Over 1000?

5 A. Air Force regulations?

6 Q. Uh-huh.

7 A. Probably not. Probably it's in the
8 hundreds.

9 Q. What about DOD regulations? A lot
10 of those?

11 A. A lot of those.

12 Q. In the hundreds?

13 A. In the hundreds, yeah.

14 Q. And I'm sure you deal with
15 regulations from other agencies too as well?

16 A. Yes.

17 Q. And I think it's fair to say you
18 didn't have all those regulations memorized?

19 A. That's correct.

20 Q. And if you or your staff had a --
21 Strike that question.

22 Was one of your principal or duties

1 as JAG is to oversee the military prosecutions?

2 A. Yes.

3 Q. And during your time at Holloman,
4 about how many criminal trials did your office
5 have?

6 A. It was in the neighborhood of 40.

7 Q. 40?

8 A. Something like that.

9 Q. And are certain criminal matters
10 resolved --

11 A. Probably just shy of that. Between
12 somewhere pretty close to 35.

13 Q. And are there other criminal matters
14 that are resolved before trial?

15 A. Yes.

16 Q. Do you know how many of those there
17 were?

18 A. That would probably be close to 100,
19 150. And it's not that they were all disposed,
20 but some cases, the cases not substantiated as
21 far as probable cause or meeting the threshold
22 to go to prosecution. Others just didn't meet

1 the level of threshold for prosecution.

2 Q. And were many of those violent
3 offences?

4 A. There were some. I don't know there
5 was many. We had probably more drug offences.
6 I guess if you include sex assault as a violent
7 offence, then --

8 (Discussion with Court Reporter.)

9 -- there would be more rather than
10 just assault consummated by battery.

11 Q. I'd like to turn now specifically to
12 the Devin Kelley criminal prosecution. I think
13 you said earlier you were involved with that?

14 A. Yes.

15 Q. How involved were you?

16 A. Significantly involved.

17 Q. What types of --

18 What did you do with respect to that
19 investigation?

20 A. One of the first things I did was I
21 got a brief on it, and then I looked at the
22 case file, which included the report of

1 investigation, all the other evidence that
2 would accompany that, or hearings was part of
3 the weekly updates. And then as far as --

4 We preferred charges shortly after I
5 got there, and we determined --

6 I guess before that we looked at our
7 case theory, everything that goes into a trial.
8 Looked at the case theory, focused on what we
9 were interested in charging and what we thought
10 the main part of the defense was. He also had
11 an AWOL, escaping the mental health
12 institution. But we thought that the assaults
13 were the most important parts of the case, and
14 that's what we chose to charge. And then we
15 went through and reviewed with trial counsel
16 throughout the case all the different steps
17 that they would do to build their case, the
18 trial notebooks, the arguments. And then we
19 had some discussions also on transitional
20 compensation and then witness issues. So
21 pretty much everything that it would take to
22 litigate a case. I was overseeing it and

1 coaching basically.

2 Not --

3 That's probably the wrong word. I
4 view myself as a coach, and the trial team is
5 taking charge of the case, and I'm supervising.

6 Q. Sure. So you oversaw the charges
7 that were filed against Kelley?

8 A. Yes.

9 Q. And you oversaw the plea agreement?

10 A. Our part of it. The plea agreement,
11 we talked about it, I think we probably even
12 conceived of it in our office, but that was not
13 under our authority to execute. We coordinated
14 that with our higher Headquarters.

15 Q. And by higher Headquarters, who was
16 that?

17 A. That was 12th Air Force, Judge
18 Advocate. And the convening authority at 12th
19 Air Force would be the Staff Judge Advocate
20 Jeff Schlegel, Colonel Jeff Schlegel.

21 Q. And is it correct that your office
22 could not enter into the plea agreement without

1 their consent?

2 A. That's correct. The plea agreement
3 is actually between Airman Kelley and the
4 general who was the 12th Air Force Command.

5 Q. With respect to the criminal
6 prosecution of Kelley, was Kelley held in
7 pre-trial confinement?

8 A. Yes.

9 Q. And was that a consideration in your
10 prosecution of the case?

11 A. Yes.

12 Q. How so?

13 A. Primarily Article 10 of the Uniform
14 Codes of Military Justice requires that a
15 different type of priority and processing be
16 given to someone who is in trial --

17 Or I'm sorry.

18 -- in confinement before a court
19 martial or a trial. So that's a speedy trial
20 measure, and you have to do everything you can
21 to move that case expediently-- expeditiously
22 is probably the better word -- and taking

1 action diligently every day to move that case.
2 And it gets priority, and we were aware of that
3 and made sure that we were putting the proper
4 attention on this case just to move it along,
5 but it did not factor into curbing any of the
6 process, or I don't even think it factored too
7 much into the pretrial agreement. We had the
8 court date set whether we were going to
9 litigate it or whether it was going to be a
10 guilty plea.

11 Q. Were there concerns about Kelley
12 being potentially released from pretrial
13 confinement?

14 A. I don't think so. Not that I
15 recall.

16 Q. Would you have been concerned if
17 that had been suggested or if that had come up?

18 A. Yes.

19 Q. Why is that?

20 A. I think that based on his history he
21 had proved to be a flight risk, he had proved
22 or there was evidence he had tried to purchase

1 a weapon. These are violent offences.

2 Q. So, is it fair to say you felt it
3 was important that he stay in pre-trial
4 confinement?

5 A. Yes.

6 Q. With respect to the plea agreement
7 that was reached with Kelley, do you recall how
8 long the maximum sentence was under that
9 agreement?

10 A. The maximum confinement that would
11 have been approved would have been 3 years.

12 Q. And what were some of the factors
13 that went into, I guess, accepting or proposing
14 that agreement to defense counsel?

15 A. There's a number of different
16 factors. One of them is always going to be
17 justice, and we looked at for these types of
18 cases what are similar punishments for similar
19 offences. What were similar punishments. We
20 consulted with our senior trial counsel, who
21 was given to us from the Headquarters of the
22 Air Force, had more experience. And we talked

1 to our higher Headquarters as well. So we
2 looked at what do we think is a fair and just
3 sentence with the interests of society. The
4 other part is this case was --

5 The most serious offence was the
6 child abuse, the aggravated assault on the
7 child. That case initially was investigated
8 and had jurisdiction with civilian authorities
9 where both the mother and father were a suspect
10 and they could not distinguish between which
11 one may have caused the injury. It was when
12 Airman Kelley provided the video that he became
13 the accused. The defendant. Our assessment
14 was that if we litigated that case and Ms.
15 Kelley was there, the mother was there also,
16 there's possibility that they would try to cast
17 doubt on his guilt by saying it could have been
18 the mother and he could have been covering for
19 her. So that was one potential litigation risk
20 we factored in. The other part was the
21 credibility of Ms. Kelley. She had given
22 different versions of certain stories, which is

1 not uncommon, but that can affect the ability
2 to obtain a conviction. And we felt it was
3 most important to obtain a conviction with
4 domestic violence. So there was one case or
5 one mitigated charge that went forward where
6 there was a corroborating witness, and she had
7 said that she was --

8 -- he drug her by her hair, and it
9 was someone who had helped fixed her hair or
10 maybe a hairdresser that noticed hair missing.
11 So we felt that those two charges, with the
12 confession and the medical records and her
13 statement with a witness would survive, and
14 that would also allow for a conviction on both
15 domestic violence offence, and then we would be
16 able to have the Lautenberg Amendment
17 triggered. So at the risk of --

18 We didn't want to risk those and a
19 conviction, and so we thought that it was best
20 to go forward with the pretrial agreement. And
21 there was discussion with the defense and also
22 with our higher Headquarters and senior trial

1 consultant.

2 Q. Were there concerns about the
3 veracity of the Kelley confession? Devin
4 Kelley.

5 A. There were some.

6 Q. What was the nature of those
7 concerns?

8 A. Substantial amount of time had
9 passed from the injuries to the time he made
10 the video. The child was not in the home, and
11 there was some concern. People who looked at
12 the video, some thought it was self-serving,
13 that he was just trying to protect her, that it
14 may not have been a credible video where people
15 would have thought that he's just trying to get
16 the baby back to the mother. And so there was
17 a split of opinion on whether we thought there
18 was internal consistency or whether it would
19 hold up in court.

20 Q. So Is it fair to say that based on
21 the interest of justice and the available
22 evidence and witness testimony, your office

1 felt it was the right decision to recommend the
2 sentence?

3 The plea agreement.

4 A. Yes.

5 Q. And was there eventually a
6 sentencing of Devin Kelley?

7 A. There was.

8 Q. And earlier we talked about the
9 ultimate sentence being 1 year. Do you recall
10 that?

11 A. Yes.

12 Q. And how was that number of 1 year,
13 how was that reached?

14 A. A panel of members, a jury, with
15 officers and enlisted. That's his election.
16 He could go with a judge alone, he could go
17 with just officers, or he could go with
18 officers and enlisted mix. He chose the panel
19 of officers and enlisted. So the case was
20 presented, the plea agreement was not --

21 Back up.

22 Evidence was presented, they had

1 information that he had pled guilty, and then
2 they determined that the --

3 They voted on a sentence through the
4 court martial process.

5 Q. So the 1 year, that was not
6 something that was directly under your office's
7 control?

8 A. That's correct.

9 Q. Is that right?

10 A. That was the jury. We asked for
11 more.

12 Q. And after the jury sentencing, did
13 your office put on evidence?

14 A. Yes.

15 Q. And did you --

16 Is your opinion that the office put
17 on a strong case?

18 A. Yes.

19 Q. And do you have any view as to why
20 the jury ultimately reached its decision of 1
21 year?

22 A. No, I don't have access to the jury

1 deliberations. But we were deliberate about
2 making sure all the evidence was also included
3 in the stipulation of facts. That's part of
4 the pre-trial agreement where the accused,
5 Airman Kelley, would agree to a reasonable
6 stipulation of fact. We put lots of
7 information in there and included exhibits,
8 including things like the video, added captions
9 to that where it wouldn't be contested. So the
10 information regarding the offences I thought
11 was well represented.

12 Q. Were there any mitigating factors
13 that you were concerned might lead to a lower
14 ultimate sentence?

15 A. There's always the fact that someone
16 may have been in confinement for a period of
17 time. Most of the --

18 Most of the time people look at that
19 as a mitigating factor.

20 Q. Uh-huh.

21 A. Yes, there was another one that was
22 important. On the assault on the child there

1 was a head jury and there was a question on
2 whether that was going to cause permanent
3 injury. Experts were able to answer because
4 almost 2 years had passed since the date of
5 injury. And they said that they did not think
6 there would be permanent injury to the child.
7 He had done a good job of progressing and they
8 had done their tests, and the tests --

9 That was part of our process of
10 getting to the trial, make sure we had the best
11 information we could on that.

12 So in some ways what is a very
13 serious offence, the assault on a child, didn't
14 have the most egregious harm or results.

15 Q. Might seem like an odd question, but
16 other than the sentencing of Kelley and the
17 punishment he did receive, the bad conduct
18 discharge, reduction in pay, but most
19 importantly the year confinement, is there
20 anything else that your office could have done
21 to keep Kelley from society? To keep him
22 locked up.

1 A. To keep him locked up beyond the
2 sentence?

3 Q. Right.

4 A. No.

5 Q. To go back for a minute to just your
6 role as a JAG at Holloman, and you talked about
7 a big part of the role being the criminal
8 prosecutions. And might seem like a basic
9 question, but why are criminal prosecutions
10 important?

11 A. There's a number of reasons.
12 There's protection of society, there's also in
13 the military the interest that good order and
14 discipline is satisfied. There's deterrence of
15 the individual and deterrence of other people
16 who might commit similar offences. Then
17 there's the idea of rehabilitating the
18 individual. Those are all parts of the court
19 martial process.

20 Q. So protecting society from these
21 individuals is certainly part of it?

22 A. Yes, it is.

1 Q. I'm going to shift gears. I'm not
2 sure this was covered. It might have been, but
3 just to be clear, did your office, the JAG
4 Office, did the regulations require your office
5 to submit any disqualifying information on
6 Kelley into the NICS system?

7 A. No.

8 Q. And you talked earlier about the
9 AFOSI and the Security Forces on Holloman.
10 What was your all office's role with respect to
11 those organizations?

12 A. We would advise on different
13 substantives of the investigation, answer
14 questions they have about search issues, search
15 authorization, coordinate with them through the
16 litigation process.

17 Q. Did your office have any legal
18 obligation or regulatory obligation to train
19 Security Forces or AFOSI?

20 A. We would train them on aspects of
21 the cases that pertained to litigation support.
22 We would collect evidence or standards of

1 search and seizer. Constitutional issues
2 primarily.

3 Q. And that was required by the
4 regulations?

5 A. I don't know if it was required by
6 the regulations.

7 Q. But it's something your office did?

8 A. Yes.

9 Q. What about with respect to
10 fingerprinting, final disposition reports,
11 submitting them to NICS. Did your office have
12 any --

13 -- the JAG Office have any
14 obligation to teach or instruct Security Forces
15 on those obligations?

16 A. No.

17 Q. And did your office have any
18 regulatory obligation, mandatory obligation to
19 ensure that Security Forces or AFOSI did what
20 they were required to do with respect to
21 indexing?

22 A. Not with the entry, no. Part of the

1 process, if they requested us about probable,
2 cause that would be different.

3 Q. And earlier Mr. Alsaffar asked about
4 sending out the report of trial and whether you
5 had received confirmation that it had been
6 received. And you said it might have gone out
7 by hand delivery or U.S. Mail, perhaps an
8 e-mail. Do you recall that?

9 A. Yes.

10 Q. At the time around the Kelley report
11 would have gone out, were there -- if you
12 recall -- were there any issues with your
13 office with not sending out mail?

14 A. No.

15 Q. Were there any issues with mail not
16 being received?

17 A. I was not aware of any.

18 Q. Were there any issues with e-mails
19 not being received?

20 A. I was not aware of any.

21 Q. And did you have any reason to
22 believe that the different offices listed on

1 the distribution list, did you have any reason
2 to believe that they did not receive that
3 report?

4 A. No.

5 Q. Is it fair to say that you
6 personally were not responsible for mailing
7 those reports?

8 A. Yes. I didn't execute it. The
9 Staff Judge Advocate is responsible for
10 everything that happens in the office.

11 Q. Who would have --

12 A. It would have been one of my
13 paralegals providing it.

14 Q. And you would have tasked them with
15 that responsibility?

16 A. Right. And we had intermediate
17 supervisors.

18 Q. And no one ever reported to you
19 there was an issue with the final disposition
20 report or report of trial being received?

21 A. That's correct.

22 Q. Talked about earlier Mr. Alsaffar

1 asked about different regulations and instances
2 where may have been probable cause or
3 statements, either opinions on statements of
4 various --

5 -- your opinions on various
6 statements that were made. Those opinions,
7 were those your own personal opinions?

8 A. Yes.

9 Q. I or no one on my team asked you to
10 testify officially on behalf of the Air Force,
11 did we?

12 A. No. I didn't know who was calling
13 me.

14 I do now.

15 Q. Earlier we talked about probable
16 cause determinations and submission of
17 fingerprints. And those sometimes turn out
18 that even where there was probable cause that
19 an offence had been committed, that ultimately
20 there was no conviction?

21 A. Yes.

22 Q. And but in certain of those cases

1 would you agree that the --

2 In certain of those cases would you
3 agree that fingerprints still had to be
4 submitted to III?

5 A. Yes.

6 Q. And if an offence has been indexed
7 but there was an acquittal at trial, could it
8 be possible that the offence would still show
9 up in a background check search?

10 A. It could be. Yes.

11 Q. And could that cause problems?

12 A. It can.

13 Q. How?

14 A. There's a number of things. When
15 someone is indexed or they're put into a system
16 that they've been arrested, different
17 organizations have access to that, and so it
18 can affect the ability to get jobs, it can
19 affect the ability to volunteer in different
20 places. So it can affect what we consider to
21 be fundamental rights of American citizens
22 under our Constitution. And so that's --

1 We try to be careful to make sure
2 that those thresholds are met and that those
3 assessments are being made at the right time.

4 But on the other side, right?

5 -- we want to make sure we're
6 protecting society. So it's a balance, and
7 it's a tough one.

8 Q. So is it fair to say there are
9 important interests on both sides?

10 A. There are.

11 MR. FURMAN: Can we go off the
12 record.

13 MR. ALSAFFAR: Sure.

14 MR. FURMAN: I need like 2 minutes.

15 THE VIDEOGRAPHER: Going off the
16 record at 18:04.

17 (Recess taken.)

18 (Deposition resumed.)

19 Going back on the record at 18:11.

20 BY MR. FURMAN:

21 Q. Thanks Colonel. I just want to tie
22 up one thing. When you became the JAG at

1 Holloman Air Force Base, was Devin Kelley
2 already in confinement?

3 A. Yes.

4 Q. And I believe one of the potential
5 charges for which he was held in pre-trial
6 confinement was AWOL. Is that right?

7 A. Yes.

8 Q. And your office ultimately did not
9 charge that crime. Is that correct?

10 A. That's correct.

11 Q. Do you recall why not?

12 A. I think that we thought it might be
13 a distractor because it did not flow with the
14 other offences. I guess we could have put it
15 in, but there was quite a bit of discussion
16 beforehand that they thought the best way to
17 try the case was focusing on the assault.

18 Q. Do you recall specifically what
19 evidence your office had that he was in fact
20 AWOL?

21 A. I do not recall the specific
22 evidence we had.

1 Q. Is it possible that your office
2 didn't include that charge because you felt the
3 evidence was insufficient?

4 MR. ALSAFFAR: Objection. Form.

5 THE WITNESS: It's possible. I
6 don't recall specifically all the factors that
7 went into that.

8 MR. FURMAN: Pass the witness.

9

10 EXAMINATION

11 BY MR. ALSAFFAR:

12 Q. Just because there are a lot of
13 laws, that's not an excuse to not follow
14 regulations, especially when they're mandatory,
15 right? Agreed?

16 A. That's correct.

17 Q. You testified earlier that Devin
18 Kelley had escaped. He was AWOL because he
19 escaped the mental health institution. Do you
20 remember that?

21 A. Yes.

22 MR. FURMAN: Objection to form.

1 BY MR. ALSAFFAR:

2 Q. And you can't escape something that
3 you're voluntarily there for. Would you agree
4 with that?

5 MR. FURMAN: Objection to form.

6 THE WITNESS: I don't know that
7 that's complete. I mean, if you voluntarily
8 submit to a 3-week program and it's inpatient,
9 and leave the inpatient without permission --

10 If you voluntarily submit to a
11 program, and it's an inpatient program with
12 requirements that you cannot leave unless
13 you're discharged, if you do so without
14 permission then that would be colloquially
15 escaping.

16 BY MR. ALSAFFAR:

17 Q. But you as a SJA Commander at
18 Holloman Air Force Base would not characterize
19 something that's AWOL if the person left a
20 voluntary situation that he was allowed to
21 leave whenever he wanted to --

22 MR. FURMAN: Objection to form.

1 MR. ALSAFFAR: -- right?

2 THE WITNESS: That's correct.

3 MR. ALSAFFAR: Okay. No questions.

4 I have no more questions.

5 MR. FURMAN: We'd like to read and
6 sign the transcript.

7 Thank you.

8 MR. ALSAFFAR: You're done.

9 THE VIDEOGRAPHER: Going off the
10 record at 18:14. This marks the end of DVD No.
11 3. This also marks the end of the deposition.

12 (Deposition concluded.)

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DEPOSITION ERRATA SHEET

Our Assignment No. J4732632

Case Caption:

Joe Holcombe, et al

vs.

United States of America

DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury that I have read the entire transcript of my Deposition taken in the captioned matter or the same has been read to me, and the same is true and accurate, save and except for changes and/or corrections, if any, as indicated by me on the DEPOSITION ERRATA SHEET hereof, with the understanding that I offer these changes as if still under oath.

Signed on the _____ day of _____, 2019.

Colonel Owen Tullos

DEPOSITION ERRATA SHEET

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Colonel Owen Tullos

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Colonel Owen Tullos

CERTIFICATE OF NOTARY PUBLIC

I, Terry L. Bradley, the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me in shorthand and thereafter reduced to computerized transcription under my direction; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.



Notary Public in and for
the District of Columbia

My Commission expires: April 30, 2022